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ABSTRACT

Intended for the Impartial Due Process Hearing Officer, the manual provides information on hearing procedures with particular emphasis on Wyoming's rules and regulations and the mandates of P.L. 94-142 (the Education for All Handicapped Children Act). Chapter I reviews the constitutional and legislative background for due process procedures. Chapter II points out circumstances when a hearing may be initiated by either the parent or public education agency. A third chapter considers the hearing officer's duties and responsibilities. A fourth chapter addresses the sequence of correspondence and written communication which transpires at the point of request for a hearing by a parent or public agency. Sample communication formats are offered. Chapter V focuses on hearing procedures with sections on the opening statement, the opening of formal testimony, special considerations, closing statements, and final remarks. A final chapter discusses the purpose, constraints, preparation, administrative review, and civil action relating to the decision. Among appended materials are the following: a glossary; information on Wyoming Rules and Regulations, Statutes, and state legislation; guidelines for writing the decision; hearing officer qualifications; sample decisions; challenges to impartiality of the hearing officer; and the jurisdiction of due process hearing officers. (SB)

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THE IMPARTIAL HEARING OFFICER:

A PROCEDURAL SAFEGUARDS TRAINING MANUAL FOR WYOMING

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June, 1981

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The Intermountain Plains Regional Resource Center
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PREFACE

PREFACE

Having accepted appointment as an Impartial Due Process Hearing Officer, you will be responsible for many and various procedures involved in ensuring that all parties are provided a fair and impartial hearing.

This responsibility requires that you understand completely the procedures necessary not only to conduct the hearing but also to conduct prehearing and posthearing activities. These three phases are all equally important to the successful performance of your responsibilities as an Impartial Due Process Hearing Officer. The hearing itself will represent the central focus of the process, but it represents only one phase of the activities for which you are responsible. Equally important are the prehearing and posthearing activities. Setting the tone or attitude that surrounds the hearing procedure is also of importance if those involved are to feel that they had a fair and impartial hearing on matters that are of considerable importance to them. Each hearing for which you serve as hearing officer should be approached with a seriousness and committment equal to the meaning that the hearing will have for the parties involved, particularly the parents of a handicapped child and other concerned persons. Your leadership will set the tone for a fair, impartial, timely and expeditious proceeding.

The purpose of this training manual is to facilitate your acquisition and understanding of the procedures necessary to be an efficient and effective hearing officer. The manual also contains basic reference documents that are important to your role. Without a basic understanding of the Wyoming Rules and Regulations Governing Programs and Services

for Handicapped Children; the Wyoming State Board of Education Rules and Regulations Governing Entitlements Under Section 309(e) of the Wyoming Education Code; Selected Statutes from the Wyoming Education Code of 1969 As Amended Pertaining To The Education Of Handicapped Children; the Education for All Handicapped Children Act of 1975 (P.L. 94-142) and the Rules and Regulations (34 CFR 300.1-300.754) promulgated thereunder, your role as a Hearing Officer will not be effective. You need not know these documents so well you can quote them without reference. You do need to know them well enough to use them wisely and efficiently.

The procedures contained in this manual have been utilized in the past by other Hearing Officers and have been found to be effective. Each procedure--indicated as needed--is referenced to a detailed set of activities which you should employ to accomplish the process thoroughly and efficiently. Where procedures call for letters, telephone calls, writing of a decision, etc., formats and samples of these are presented for your consideration and use.

SPECIAL MESSAGE TO USERS OF THIS NOTEBOOK

At the time this manual was being developed consideration was being given to changing the procedures for the initiation and conduct of a due process hearing in Wyoming. The proposed change would make the chief administrative officer of the local school district/agency the one who would receive the written notice of request for a hearing rather than the State Superintendent of Public Instruction. Under the proposed change the local education agency would be responsible for ensuring the procedural safeguards guaranteed under P. L. 94-142. Local education agencies would be responsible for making sure that the due process hearing was held according to Subpart E, §300.500 et seq of 34 CFR and the Wyoming State Board of Education Rules and Regulations governing Programs and Services for Handicapped Children in Wyoming School Districts. (See Appendices B & C of the Manual.) The manual was written in anticipation of the proposed changes and conforms to Subpart E, §300.500 et seq. of 34 CFR. It also conforms to Wyoming Rules on all respects except those references to the above referenced matter.

DUE PROCESS HEARING OFFICERS MUST USE CHAPTER XI, SECTION 5 OF THE WYOMING RULES REGARDING THE INITIATION AND CONDUCT OF A DUE PROCESS HEARING UNTIL CHANGED.

Users of Manual will note variations on pages 8, 14, 47, 52, and H-2. All users who received the Manual on or before September 16, 1981 should substitute the enclosed pages for those currently in the Manual. Changes will have been made for all other recipients of the Manual.

9/28/81

TABLE OF CONTENTS

TABLE OF CONTENTS

Preface	i
Chapter I Constitutional and Legislative Background	1
Chapter II When May A Hearing Be Initiated	7
Chapter III Hearing Officer Duties and Responsibilities	10
Chapter IV Preparing For The Hearing	15
Chapter V Hearing Procedures	39
Chapter VI Decision	48
Appendices (Appendices are number by letter and number. i.e., A-1, A-2, etc.)	56
Appendix A (Glossary)	A-1
Appendix B (34 C. F. R., Part 300)	B-1
Appendix C (Wyoming Rules and Reuglations Governing Programs and Services for Handicapped Children in Wyoming School Districts	C-1
Appendix D (Wyoming Selected Statutes Pertaining to Education of the Handicapped)	D-1
Appendix E (Writing the Decision)	E-1
Appendix F (Entitlements Under Sec. 309(e) of the Wyoming Education Code)	F-1
Appendix G (Hearing Officer Qualifications)	G-1
Appendix G-2 (Sample Decisions)	G-2
Appendix G-3 (Pre-Hearing Conference)	G-3
Appendix G-4 (Challenges to Impartiality of Hearing Officer)	G-4
Appendix H (Wyoming Rules of Civil Procedure)	F-1

Table of Contents (Continued)

Appendix I (Jurisdiction of Due Process Hearing Officers) I-1

Appendix J (Wyoming Education Code, 1969 As Amended--
Duties of Board of Trustees--Selected Section) J-1

CHAPTER I

Constitutional and Legislative Background

Chapter 1

CONSTITUTIONAL AND LEGISLATIVE BACKGROUND

Constitutional Protections

Through long-standing tradition, the states have provided public education for almost all children in the United States. But because many handicapped children were left outside traditional school patterns, constitutional guarantees of equal treatment and due process were brought to bear by advocates of handicapped children.

The Fifth Amendment (on due process) and the Fourteenth Amendment (on due process and equal protection) have been cited as guaranteeing the rights of handicapped children to a public education. More recently, the Eighth Amendment has been cited as extending protection to handicapped persons in institutions, because without education, training and habilitation, the constitutional right to be free from harm is violated [Halderman v. Pennhurst, C.A. No. 74-1345 (E.D. Pa. December 23, 1977)].

Federal Case Law

The basis for the current right-to-education cases may be traced to the landmark decision in Brown v. The Board of Education in 1954. In this decision, the U. S. Supreme Court stated:

> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today, it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education (345 U.S. 483, 493).

The Brown Decision related to public school segregation on the basis of race, but the fundamental positions in the decision formed the basis of future arguments relating to education for handicapped children.

The most useful concepts pertinent to the basic formulation of a right-to-education argument emanate from the principles of equal protection and due process in the U. S. Constitution. Equal protection relates to the idea that individuals in similar circumstances must receive similar treatment. Due process relates to the utilization of fair procedures in reaching a decision.

These two concepts are stated clearly in the landmark cases relating to the right to education for handicapped children: Pennsylvania Association for Retarded Children (PARC) v. Commonwealth of Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971) and Mills v. Board of Education of the District of Columbia, 348 F. Supp. 866 (D. D.C. 1972).

The PARC case was brought before the court by the parents of 14 mentally retarded children and all other children similarly situated. The court approved a stipulation providing that no mentally retarded child could be reassigned or initially assigned to either a special education class or a regular education class or could be excluded from a public school without a hearing before a hearing officer. In addition, the court outlined a comprehensive, 23-step due process procedure to be utilized in making any changes relating to a mentally retarded child's educational status.

In the PARC decree, the court stated that:

> . . . a mentally retarded person can benefit at any point in his life and development from a program of education.

The court, believing in the benefits of education, went on to require the state to locate, evaluate, and reevaluate all school-aged children who had been excluded from public schools. Public schools were required to provide retarded children with a free, appropriate education, preferably in a regular classroom.

Whereas the PARC decision specifically concerned mentally retarded children, the Mills decision extended the due process procedures applied in PARC to all handicapped children. The Mills case established two basic safeguards applying to the public education of handicapped children. First, exclusion from a public school program could not take place unless suitable, alternative educational services were provided, and second, there must be a prior due process hearing and periodic review of the child's educational status and progress.

Both the Mills and PARC cases established an increasingly important educational concept that has come to be termed "the least restrictive environment." The foundation of this concept, as stated in PARC, follows:

> . . . among the alternative programs of education and training required by statute to be available, placement in a regular public school class is preferable to placement in a special public school class, and placement in a special public school class is preferable to placement in any other type of education and training (343 F. Supp., 307).

Federal Legislation

Reacting to rising parental demands and to improved educational technology demonstrated within the right to education litigation,

Congress, in a nearly unanimous vote, enacted Public Law (PL) 94-142, the Education for All Handicapped Children Act of 1975. Congress recognizes that the education of all children is a responsibility of state governments. Nevertheless, Congress also asserted the federal responsibility of providing financial assistance to the states in order to provide additional funds for the education of handicapped children. In return for these funds, PL 94-142 requires each state to adopt policies and procedures which are consistent with the Act and which guarantee the right to education for all handicapped children.

PL 94-142 expands the due process procedures that were set out in the prior litigation relating to the right to education and the initial codification contained in PL 93-380 (The Education Amendments of 1974). That law required the provision of notice to parents and the opportunity for an impartial hearing prior to the change of any educational program for handicapped children. PL 94-142 expands these provisions to include the right to counsel, the right to examine witnesses, the right to a verbatim record of the hearing, and the right to a written decision within a specified time period. PL 94-142 and the Office of Education regulations implementing the law represent the most comprehensive statement of due process pertaining to handicapped children to date.

An associated piece of legislation, the Rehabilitation Act of 1973 (PL 93-112), contains provisions within Section 504 that also impact on the education of handicapped children. Essentially, Section 504 is a statement of rights for the handicapped. It states:

> No otherwise qualified handicapped individual in the United States as defined, shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

The provisions of Section 504 apply to all programs receiving federal assistance, regardless of level: preschool, elementary, secondary, postsecondary, adult or vocational. The regulations published to implement the Act specifically state that they were developed to conform to the provisions included in PARC, Mills, and PL 94-142. Section 504 carries sanctions in that noncompliance can involve the loss of all federal dollars, whereas previous noncompliance with PL 94-142 endangered only the dollars allocated under that Act.

The legislation noted above (PL 94-142 and Section 504, PL 93-112) is joined by still another piece of legislation, The Developmentally Disabled Assistance and Bill of Rights (42 U.S.C. [S8S8] 6001-6080). On April 20, 1981, the United States Supreme Court, in a limited decision with potentially widespread implications for institutional rights, has overruled the Third Circuit and concluded there is no mandatory obligation on states who receive funds under the Developmental Disabilities Act to provide habilitation or treatment in the least restrictive environment [Penhurst v. Halderman, 49 USLW 4363 (U. S. April 20, 1981)]. Many controversial issues remain as a result of the Penhurst Case. One issue seems clear, however; namely, the legislation failed to put the states on sufficient notice that they would have to provide appropriate habilitation in the least restrictive setting. In order to create such an obligation Congress must do so explicitly, which it failed to do in this situation.

The Penhurst Case and many others are discussed albiet briefly in the Mental Disabilities Law Reporter. Case law, federal regulations, OCR rulings and other matters are found in the Education for the Handicapped Law Report. Readers are encouraged to use these references for a better understanding of legal issues as they relate to the decisions hearing officers must make.

Because P.L. 94-142, P.L.93-112 and the Developmentally Disabled Assistance Bill of Rights may be subject to changes in the years ahead, due process hearing officers and other parties involved in disputed cases involving the handicapped would do well to rely first on State statutes and the Rules and Regulations promulgated thereunder. State statutes and Rules and Regulations developed by the Wyoming State Board of Education should always be used first. They are the most appropriate for resolving cases involving handicapped children receiving services in this state.

CHAPTER II

When May A Hearing Be Initiated?

Chapter 2

WHEN MAY A HEARING BE INITIATED

Public Law 94-142--The Education for All Handicapped Children Act of 1975--provides a number of assurances that handicapped children will receive: (a) a free appropriate public education, (b) nondiscriminatory assessment, (c) and individualized and appropriate education, (d) provided in the least restrictive environment, (e) parent participatory decision making regarding the handicapped child's education and (f) numerous guarantees of procedural due process. Section 504 of the Rehabilitation Act of 1973 also provides assurances for due process and procedural safeguards and extends the protection provided by P. L. 94-142 through more stringent penalties for noncompliance.

The documents noted in the Preface [Wyoming State Board of Education Rules and Regulations Governing Programs and Services for Handicapped Children in Wyoming School Districts (hereinafter referred to as Wyoming Rules) and the Code of Federal Regulations (CFR) 34, Part 300.1 through 300.754] provides the basis for procedures for Impartial Due Process Hearings and specify the educational rights of handicapped children and their parents.

Both Wyoming Rules and CFR 34, § 300. specify circumstances wherein either parent or public education agency may initiate a due process hearing. These circumstances are tied to the guarantees provided under P. L. 94-142 noted above. In brief, the law requires that within 45 days after a written request for an Impartial Due Process Hearing has been received a Hearing Officer must be appointed, the hearing held, a decision reached and written by the Hearing Officer, and the decision sent to the parties involved. If either party disputes the findings and

decision of the Hearing Officer, an appeal from the decision may be made to the State Department of Education (assuming the State was not one of the parties involved in the original hearing). If the appeal to the State is disputed by either party, an appeal may be made to a court of appropriate jurisdiction.*

Under what circumstances may an Impartial Due Process Hearing be initiated? The matrix below displays the four areas where disputes may arise that could lead to a hearing.

Parties / Issues*	Parent		Public Educational Agency	
	Proposes	Refuses/ Disagrees	Proposes	Refuses/ Disagrees
1. Identification of the student as handicapped				
2. Evaluation of the student				
3. Placement of the student				
4. Provision of a free appropriate public education				

*Public Law 94-142 provides for the impartial due process hearing related to "notice" and "independent evaluation" as well.

Examples of circumstances where the two parties may differ follows:

1) A hearing might be held regarding the identification of a child as handicapped, or failure to identify a child as handicapped.

*This statement assumes a change from present procedures followed in Wyoming where requests for a due process hearing go directly to the State Superintendent. (See page iii for more detail.)

2) A hearing might be called by the parents when the school fails to evaluate, or is charged with inadequately evaluating a child.
3) A hearing might be called to determine if an appropriate placement in a program was made available to the student.
4) A hearing might be initiated if the parents want a public school placement for their child; or
5) Parents might initiate a hearing on whether or not services offered are in the least restrictive environment needed to meet their child's needs; or
6) A hearing might be called by the parents to request that the local school pay for continued private placement of their child, charging that the school is unable or unwilling to make available an appropriate program.
7) Parents might initiate a hearing claiming failure by the school to provide all the NEEDED services IDENTIFIED to enable a student to reasonably benefit from special education.
8) A hearing might be called if a needed service identified to enable a student to benefit from special education is available to a student only at some cost to the parents.
9) The school may initiate a hearing to gain consent to evaluate a student when the parent has refused permission.
10) A hearing might be called by the school to place a student in special education if the parent refuses consent.

The preceding list is not exhaustive, but offers examples of issues that might arise through services or lack of services in the areas of identification, evaluation, placement, and the provision of a free appropriate public education.

CHAPTER III

Hearing Officer Duties and Responsibilities

Chapter 3

HEARING OFFICER DUTIES, RESPONSIBILITIES AND PROCEDURES

AN INTRODUCTION

An impartial due process hearing is predicated upon an impasse: the parents of a handicapped child and a public educational agency have been unable to resolve a particular issue or series of issues regarding the educational or related services to be provided for a child. Either the parents or the educational agency has initiated an impartial due process hearing.

Jurisdiction

Hearing officers face the problems of knowing those issues over which they have jurisdiction. Is it within the jurisdiction of a due process hearing officer to award damages? If in the course of conducting a due process hearing he/she comes upon issues that have not been specified in a petitioner's prayer, can he rule on these issues? Can a due process hearing officer use the hearing as a platform to enable a school district to accomplish some needed reform to benefit handicapped children? Remembering that P.L. 94-142 is designed not only to guarantee a free appropriate public education, nondiscriminatory evaluation, procedural due process, and parental participatory decision making but also as a vehicle for the schools to ensure that handicapped students receive individualized educational programs and related services, what are the limits of the hearing officer?

Current law on the subject is found in the landmark precedent setting cases such as PARC,[1] Mills,[2] and LeBanks v. Spears.[3] Other litigation, while limited by the facts involved in a particular case, also shed some

light on the question of jurisdiction. Loughran v. Flanders (See at 3 EHLR 551:161 et seq.) held that alleged cause for monetary damages would be contrary to both the history and the purpose of the Education for All Handicapped Children Act of 1975 and its statutory predecessors.

One of the functions of the Act, among other things, is to provide parents/guardians of a handicapped child the opportunity to participate in the educational decision making process. A guarantee of this right of participatory decision making regarding a handicapped child is the impartial due process hearing whereby a parent/guardian may challenge: (1) the identification, (2) the evaluation, and/or (3) the placement of a handicapped child (20 U.S.C. § 1415). Specifically, after a complaint regarding a child's identification, evaluation or placement is made, the state (directly or through a local education agency) must provide the parent/guardian with an impartial due process hearing on these issues (20 U.S.C. § 1415(e)(2). This is a limited grant of jurisdiction, however, since it authorizes review only of claims alleging (1) errors in the identification, (2) errors in the evaluation, (3) errors in the placement, (4) denial of the Act's numerous procedural safeguards (20 U.S.C. § 1415 (e)(2); see also Stuart v. Nappi, F. Supp. 1235 D. Conn. 1978).

The legislative history of P.L. 94-142 and its statutory precedessors share a common trait; namely, " . . . each is devoid of even the slightest suggestion that Congress intended for it to serve as a vehicle through which to initiate a private cause of action for damages" (Loughran v. Flanders, see at EHLR 551:163).

Absent specific authority in a State's Annual Program Plan for implementation of Part B of the Act or rules and regulations promulgated

under state statutes that grants a hearing officer jurisdiction beyond that conveyed in 20 U.S.C. § 1415 to rule on issues other than those noted above would clearly breach the jurisdiction granted on a due process hearing officer.

If a hearing officer comes upon issues that have not been specified in petitioner's prayer, to rule on such issues is clearly beyond the scope of the hearing and should be avoided. Even though the school administrator may privately desire assistance in solving a specific problem, enabling him/her to better provide for the handicapped, a decision on issues not specified in petitioner's prayer not only violates the Hearing Officer's authority but in all probability will infringe upon the prerogatives of the school board.

The Issue(s)

The issue (or issues) is the presenting complaint of the petitioner, and the Hearing Officer should not go beyond that issue in the decision. For example, if the parent's complaint is that the agency used improper methods in evaluating the child, and therefore, the placement recommendation is invalid, the Hearing Officer should limit the decision to the issue of the evaluation procedures. The Hearing Officer should not attempt to correct the difficulty be determining a proper category for the child's disability or recommending another program. The issue is the appropriateness of the evaluation procedures, and it is to that issue that the decision must be addressed.

The Evidence

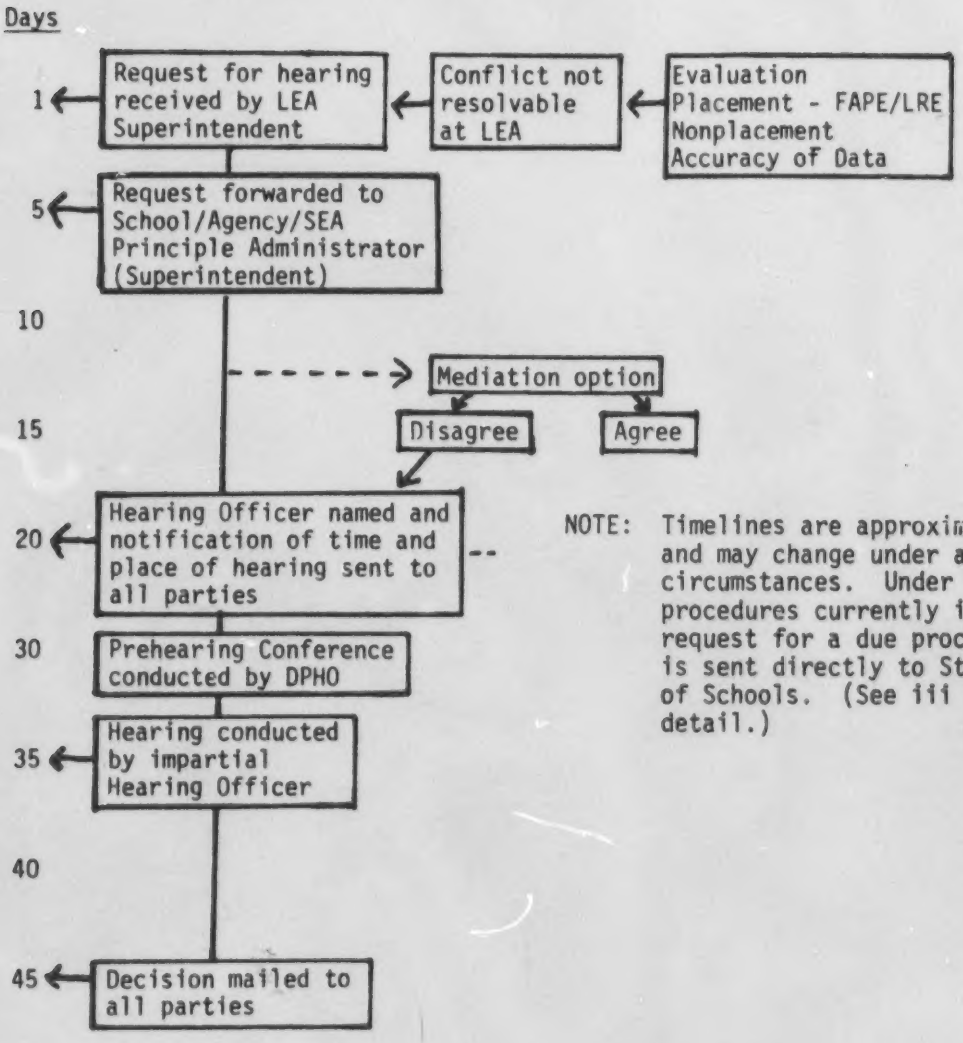
The evidence is information presented at the hearing. It cannot include written material not introduced in the hearing. If a witness

or party quotes someone else (hearsay), the Hearing Officer should not object (unless the hearsay testimony becomes lengthy); however, the hearsay would not be utilized solely in reaching a decision. If the parties are represented by counsel, objections will probably be raised about hearsay, and the Hearing Officer should then rule on the objection. Impartial due process hearings are not seen as full-fledged legal hearings, and the Impartial Hearing Officer should not try to decide legal questions, but should keep the hearing centered on the educational issue to be resolved by the hearing.

The Timeframe

The timeline for accomplishment of procedures associated with the hearing process is schematically represented on the following chart.

(Approximate)
Timeline for An
Impartial Due Process Hearing



NOTE: Timelines are approximate and may change under appropriate circumstances. Under Wyoming procedures currently in place request for a due process hearing is sent directly to State Supt. of Schools. (See iii for more detail.)

LEA = Local Education Agency
SEA = State Education Agency
FAPE = Free Appropriate Public Education
LRE = Least Restrictive Environment

Chapter 4

PREPARING FOR THE HEARING

Introduction

The role of the Hearing Officer is approached in terms of an itemized, sequential list of responsibilities. This section provides an annotated checklist for use throughout the hearing process.

The basic content of a hearing emanates from the principals of equal treatment and due process. The hearing must be conducted with fairness, and the individual presiding at such a hearing must be able to disregard personal philosophy and all prejudicial influences and conduct an unbiased examination of the information (evidence) presented during the hearing.

When the parents or the public agency request a hearing to resolve these problems, a Hearing Officer is appointed by the Wyoming Department of Education or the local education agency.*

The sequence of correspondence and written communication which transpires at the point of request for a hearing by a parent or public agency follow. These are samples for your consideration. The resultant end communications is the letter of appointment you will receive from the responsible administrative officer.

---

*See current rules and regulations regarding the appointment of the Hearing Officer and the conduct of the hearing at the local level.

Sample Format A:

PETITIONER'S WRITTEN REQUEST FOR IMPARTIAL DUE PROCESS HEARING

Name
Address
Telephone Number
Date

Superintendent of Schools
School District
Address

Dear _____:

The purpose of this letter is to request an impartial due process hearing for (name of child), born on (birth date), and enrolled at (name of school). We are requesting this hearing in order to resolve the issue of the (identification/evaluation/placement) of our child.

In order for us to prepare for this hearing, would you please provide us with the following information:

a) the procedures to follow in order to examine and copy our child's educational records,

b) a list of the agencies where we can obtain free or low cost legal assistance, and

c) a list of the individuals or agencies that will conduct an independent educational evaluation.

(Include the following section if you have not have received written notice regarding the matter under dispute from the school district.)

In addition, we are requesting a written explanation of the school district's position on this matter and a list of rights we have under the provisions of the Education for All Handicapped Children Act of 1975 (Public Law 94-142).

Sincerely,

_____

cc: School Principal
Attorney

(At your discretion, send a copy of this letter to individuals who have a substantial interest in this dispute. For example, the local principal and anyone you have engaged to represent you, such as an attorney or a parent advocacy group.)

Sample Format B

ACKNOWLEDGEMENT OF RECEIPT OF REQUEST FOR A HEARING

Dear (Parent):

The _____ School District received your request for an impartial due process hearing regarding your child's special education needs on (date).

The purpose of this letter is to inform you of the procedures which will be followed, as well as to inform you of your rights relative to the impartial due process hearing.

An impartial due process hearing officer will be selected from among those whose names appear on a roster of qualified hearing officers. Those eligible to serve as hearing officers have been specially trained by the Intermountain Plains Regional Resource Center located in Logan, Utah. You will be hearing from the due process hearing officer selected in a few days regarding the date, time and location of the hearing which will be reasonably convenient for you.

In accordance with the requirements that a final decision be reached not later than forth-five (45) days after the receipt by the district of a request for a hearing, the matter in question will be resolved by (date).

Since we share your interest in assuring that your child is receiving an appropriate education, you have the option of mediation as a means of resolving this issue prior to the hearing. This process must take place within the forty-five (45) days and will not delay or interfere with your right to a hearing and a decision by the above mentioned date.

If you have any questions regarding this matter, please contact (name of contact) of the _____ school district at (telephone number).

Sincerely yours,

_____

cc: State Director of Special Education

Sample Format C

APPOINTMENT OF HEARING OFFICER

(To Parents and Principle Parties in District/Agency)

Dear (Parents/Principle Parties in District):

This is to inform you that (name of Hearing Officer), of (address of Hearing Officer), has been appointed as the Impartial Hearing Officer in the (child's name) hearing. You will be contacted by the Hearing Officer shortly to make arrangements for the hearing.

If you have any questions, please contact (name of school contact identified in initial letter to parents).

Sincerely yours,

_____

cc: file
Hearing Officer

Note: If the Hearing Officer is selected at the time of the initial letter to parents, his/her name should be included to avoid the need for a second letter for the purpose of informing those involved of who the Hearing Officer is to be.

PREHEARING ACTIVITIES OF THE HEARING OFFICER

PREHEARING CONTACTS

The prehearing contacts with the parents of the child and the district or agency required prior to the hearing are presented in this section. The section is written in two major parts: contacts with parents and contacts with the district and/or agency. Each of these sections are immediately followed by sample forms or example communications to be used in making these contacts.

Telephone Contact with Parents

Initial contact with the parents should be made and obtain information relevant to the hearing. Areas which should be covered during this contact will determine: 1) an available hearing date; 2) that the parents are informed of the process to request a time extension, if necessary; 3) the need for an interpreter or any special accommodations; 4) if the child will be present/not present, if the hearing will be open/closed; 5) if they have been informed of their rights; 6) if there are any constraints on location (inform district/agency if any exist); 7) that the parents are aware that you will be requiring, at the time of the hearing, a copy of the written evidence that they are developing; 8) that the parents are informed about the disclosure requirement and that the district/agency will be contacting them regarding the arrangements; and 9) that they are informed about the procedures to compel witnesses, if necessary.

Sample Format D:

HEARING OFFICER'S TELEPHONE CONTACT

(Prehearing Information to Parents)

Child's Name:
Parent's Name:
Telephone Number:

School District:
School Representative
Telephone Number:

Date:
Spoke with:

The purpose of this contact is to elicit information required for the hearing. You MUST NOT discuss any information pretaining to the case.

---

1. This is __(name)__. I have been appointed as Hearing Officer in the matter concerning __(name of child)__.

2. I am calling in order to obtain the information I need to make the arrangements for the hearing. Do you have a few minutes now to answer my questions? (If not, establish another time to call.)

3. Procedural questions:

   a) Determine available hearing date (cross-check with the district/agency).
   b) Inform the parents of the process to request a time extension, if necessary.
   c) Ascertain need for an interpreter or any special accommodations.
   d) Ascertain if the child will be present/not present and if the hearing will be open/closed.

Remind the parents that any evidence they plan to introduce must be disclosed at least five school days prior to the hearing.

---

   e) Ascertain if they have been informed of their rights.
   f) Determine any constraints on location.
   g) Inform the parents about the disclosure requirement and that the district/agency will be contacting them regarding arrangements.
   h) Inform the parents about the procedure to compel witnesses, if necessary, and where to get free of inexpensive counsel if desired.

i) Inform the parents if the district/agency will be represented by counsel.
j) Does the (location) create any problems for you as a location for the hearing?
k) Is English the primary language in your home?
l) Did you request information on where to obtain an independent educational evaluation?

4. I will send you a letter today which will summarize our discussion with a copy to the public agency. Thank you for your cooperation.

After completion of the telephone call to the parents, the Hearing Officer will need to prepare a letter to the parents summarizing the telephone conversation. Contents of this written communication should contain statements which: 1) verify that all due process requirements have been met; 2) indicate that procedures for submission of written evidence and listing of witnesses was explained; 3) verify the need (or lack of need) for an interpreter or translator; 4) verify whether the hearing is to be open or closed; 5) verify that the child will/will not be present; and 6) establish agreement as to the date, time and location of the hearing, and state your telephone number as the Hearing Officer.

Sample Format E:

FOLLOWUP LETTER, PREHEARING INFORMATION

(parent)

Dear _____:

This letter will serve to summarize our telephone conversation of (date), regarding the arrangements for the hearing on the matter of (student's name). As I stated at the beginning of our conversation, the purpose of our discussion was to obtain information necessary to plan for the hearing.

We discussed the introduction of written evidence, and the presentation of witnesses.

Let me remind you again that any written information you plan to introduce must be forwarded to me after full disclosure to the (public agency's name) within the mandatory five-day time limit. Also, please complete the attached form listing the witnesses you intend to present. (Sample Form F)

In addition, we agreed that since English is the primary language of the home, there will be no need for an interpreter or translator. Also, as we agreed, the hearing will be (open/closed) and that (child's name) will/will not be present.

Finally, we agreed to hold the hearing at (location) on (date) (time). The school district has agreed to this time and location. The district will send a formal notice to you regarding the time and location of the hearing.

Thank you for your cooperation. If you need to contact me in reference to the proceedings, you may do so at (telephone number) from (hours) to (hours) on any weekday. Once again, I will not be able to discuss the facts of this case with you, only the procedural matters relating to the arrangements of the hearing.

Sincerely,

_____

Sample Format F:

INFORMATION ON WITNESSES

Information on Witnesses Re: _____
(Name of Child)

Please complete the following information.

Witnesses:

	NAME	POSITION	ADDRESS
a)			
b)			
c)			
d)			
e)			

Telephone Contact with Public Agency

At the same point in time that contact is made with the parents, the Hearing Officer should contact the involved public agency to discuss the procedural information obtained from the parents and to give and secure further information from the agency in clarification of the preliminary arrangements for the hearing. The Hearing Officer should discuss: 1) requesting all pertinent information, i.e., parents' names, address, telephone number; 2) determine available hearing dates (cross-check with parents); 3) inform the district/agency about the procedure to request a time extension, if necessary, and ascertain that the district/agency will be making arrangements for the facility; 4) ascertain that the district/agency will be providing notice to the parents on the date, time and location of the hearing; 5) inform the district/agency that you will be requiring at the time of the hearing, a copy of the written evidence that they are developing (disclosure); 6) inform the district/agency about the disclosure requirement; and 7) inform the district/agency about the procedure to compel witnesses, if necessary.

Sample Format G:

HEARING OFFICER'S TELEPHONE CONTACT

(to the Public Agency)

Child's Name:
Parent's Name:
Telephone Number:

School District:
School Representative:
Telephone Number:

Date:
Spoke with:

The purpose of this contact is to elicit information required for the hearing. You MUST NOT discuss any information pertaining to the case.

---

1. This is (name). I have been appointed as Hearing Officer in the matter concerning (name of child).

2. I am calling to ask a few questions in order to obtain information I need to make the arrangements for the hearing. Do you have a few minutes now to answer my questions? (If not, establish another time to call.)

3. Procedural questions:
   a) Request all pertinent information, i.e., parents' names, address, telephone number.
   b) Determine available hearing dates.
   c) Inform the district/agency about the procedure to request a time extension, if necessary.
   d) Ascertain that the district/agency will be making arrangements for the facility.
   e) Ascertain that the district/agency will be making arrangements for a verbatim record of the hearing.*
   f) Ascertain that the district/agency will be providing notice to the parents on the date, time and location of the hearing.
   g) Inform the district/agency that you will be requiring at the time of the hearing, a copy of the written evidence that they are developing.
   h) Inform the district/agency about the disclosure requirement.
   i) Inform the district/agency about the procedure to compel witnesses/ if necessary.
   j) Inform the district as to whether the hearing will be open/closed and whether or not the child is to be present.

*NOTE: Experience has shown that a written verbatim transcript is preferable to an electronic recording. A written verbatim transcript is also more cost efficient in the event of an appeal.

Remind the agency that any evidence to be introduced must be disclosed at least five school days prior to the hearing.

4. I will send you a letter today which will summarize our discussion; also a copy will be sent to the parents. Thank you for your cooperation.

Upon completion of the telephone conversation with the public agency, the telephone call should be documented by the preparation of a letter to the agency which summarizes the contents of the telephone conversation. Contents should include: 1) procedures for submission of written evidence and list of witnesses; 2) verification of need (or lack of need) for an interpreter or translator; 3) verification of whether the hearing is to be open or closed; 4) sharing of information as to the date, time and location of the hearing; 5) verification of procedures for obtaining a verbatim record of the hearing; and 6) your telephone number as the Hearing Officer.

Sample Format H:

FOLLOWUP LETTER, PREHEARING INFORMATION

(school district)

This letter will serve to summarize our telephone conversation of (date) regarding the arrangements for the hearing on the matter of (student's name). As I stated during our conversation, the purpose of our discussion was to obtain information necessary for the hearing.

We discussed the introduction of written evidence and the presentation of witnesses and agreed that written evidence and the attached list of witnesses must be forwarded to me after full disclosure to the parents within the mandatory five-day time limit.

In addition, we agreed that, since English is the primary language of the home, there will be no need for an interpreter or translator. Also, the parents request that the hearing be (open/closed).

Finally, we agreed to hold the hearing at (location) on (date) (time). The parents have also agreed to this time and place.

Thank you for your cooperation. If you need to contact me in reference to the proceedings, you may do so at (telephone number) from (hours) to (hours) on any weekday. Once again, I will not be able to discuss the facts of this case with you, only the procedural matters relating to the arrangements for the hearing.

Sincerely,

_____

NOTIFICATION OF HEARING

In order to ensure notification, the Public Agency or District should also send written notice of the mutually agreed upon hearing date, location and time to the parents. The Director of Special Education (and the Hearing Officer) should also be a copy recipient of this letter. Information is also sent at this time which indicates the "Impartial Due Process Rights" of the participants and a listing of "Free or Low Cost Legal Services" available to the participants.

Sample Format I:

DATE, TIME AND LOCATION OF HEARING

Dear (parent):

In complying with your request for an impartial due process hearing regarding your child's educational needs, the hearing will be held on (date), at (time), in (location). Attached you will find a copy of your hearing rights, as well as sources of free legal service available to you.

If you have any questions on this matter, you may contact (name) of the _____ School District at (telephone number).

Sincerely,

Representative of Local District/Agency

cc: State Director of Special Education
Hearing Officer

Attachment to Sample Format I:

IMPARTIAL DUE PROCESS HEARING RIGHTS

Any party to a hearing has the right to:

--Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;

--Present evidence and confront, cross-examine, and compel the attendance of witnesses;

--Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five (5) days before the hearing;

--Obtain a written or electronic verbatim record of the hearing;

--Obtain written findings of facts and decisions;

--Appeal the findings of the hearing to the State Board of Education.

Parents involved in hearings have the additional right to:

--Have the child who is the subject of the hearing present;

--Open the hearing to the public;

--Be informed by the district of free or low-cost legal and other relevant services;

--Have hearings involving oral arguments held at a reasonably convenient time and place;

--Receive a copy of the Hearing Officer's decision not later than forty-five (45) days after the receipt by the school district of the request for a hearing.

Compelling Witnesses

If it is determined by either party to the hearing that it will be necessary to compel a witness or witnesses, the hearing officer or the school/agency has the right to do this under Wyoming's Administrative Procedures Act. This act says, in part:

> In all contested cases, depositions and discovery relating thereto, the Agency or the Administrative Hearing Officer has the authority to administer oaths and affirmations, subpoena witnesses and require the production of any books, papers or other documents relevant or material to the inquiry (W.S. 9-4-107).

If the hearing officer follows Chapter XI, § 5(h)(9) of the Wyoming Rules and makes a preliminary reference of issues to a master for findings to be used as evidence when the hearing is held, the need to compel witnesses is unlikely.

Should it be necessary to compel a witness or witnesses, the hearing officer who has any questions regarding the procedure should contact the Office for Exceptional Children in the State Department of Education. This office has the services of the State Attorney General or other legal counsel to assist. If the hearing officer is a resident attorney in Wyoming, he/she will be familiar with the law and the process of serving a subpoena. And, W.S. 9-4-107 provides the "Agency or Administrative Hearing Officer" with the authority to subpoena witnesses. The hearing officer could, therefore, ask the shcool's/agency's attorney for assistance.

If the hearing officer elects to involve the Office for Exceptional Children in the State Department of Education a telephone call to this office explaining the situation is the first step. The telephone call should be followed with a letter similar to the one below.

Sample Format J:

SAMPLE LETTER TO NOTIFY STATE DIRECTOR OF SPECIAL EDUCATION

REGARDING WITNESSES TO BE COMPELLED

Dear _____:

As I told you during our telephone conversation of (time), the Impartial Due Process Hearing for (child's name) is to be held (date), (time), (location).

It is necessary that the following witness(es) be compelled to insure their attendance. The right to compel witnesses is found in the Wyoming State Board of Education Rules and Regulations Governing Programs and Services for Handicapped Children in Wyoming School District, Chapter XI, § 5(g)(8), and in 34 CFR § 300.508(a)(2). Will you please insure that a subpoena is secured and served to:

(Name of Witness(es)) (Address)

Thank you for your cooperation in this matter. As you know, the date of the forthcoming hearing in behalf of (child's name) requires that you give this matter your earliest attention. Please let me know if you have any difficulty in securing or serving the subpoena(s). If you could provide me with copies of the subpoena(s), it would be appreciated.

Sincerely yours,

Hearing Officer

*If a public education agency initiates a request to compel a witness(es), the local school board attorney should be asked to handle this matter.

Collection of Pertinent and Related Hearing Information

The Hearing Officer will be provided written materials concerning the hearing (e.g., student records, evaluation data, etc.) prior to the hearing. The Hearing Officer may determine from inspection of these materials that he/she may want to investigate in more detail other related materials, pertinent to the hearing, to obtain a fuller understanding of all materials as these might relate to and impact on the information base for the comprehensive conduction of the hearing.

Depending on the nature of the hearing, the Hearing Officer may wish to consider any one or more of the items listed below for additional information pertinent to the hearing.

Inspection of information submitted by both parties may include the following:

*Parent release of information signed by parent.

*Consent forms for preplacement evaluation signed by parent.

*Memorandum regarding change in identification or evaluation.

*Reports from educational evaluations including standardized tests.

*Reports from cumulative records and teacher evaluations of progress.

*Reports from medical, therapeutic, social service agencies or other relevant evaluations.

*Current Individualized Education Program (IEP) on the child or the proposed IEP.

*Summary of any prior informal mediation conferences.

If the Hearing Officer elects to investigate any or all of the above areas, he/she may want to utilize the "for your consideration" information which is presented in the next seven (7) areas. For each of the seven areas, information is given to direct you in your investigation.

Prior Notice Requirement

The Hearing Officer should substantiate that the requirements of prior written notice have been met in accordance with 34 CFR § 300.504 and Chapter XI, 35(a) of the Wyoming Rules (Appendix C) which provide:

> Written notice . . . must be given to the parents of a handicapped child a reasonable time before the public agency proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child (34 CFR § 300.504).

The contents of the notice, the rights of both parties, the rights of parents, the requirements for nondiscriminatory assessment, procedures for appropriate placement, confidentiality of information, appointment of surrogate parents (when required) special information (notice of free or low-cost legal services), independent educational evaluation at public expense, and other information may be found in 34 CFR § 300.504 et seq., (Appendix B) and/or Wyoming Rules, Chapter XI, § 5 et seq. (Appendix C). In brief 34 CFR, Part 300.504 and Wyoming Rules, Chapter XI, Section 5 provide:

Opportunity to examine records.

Right to an independent educational evaluation.

Prior notice.

Parental consent.

Right to an impartial due process hearing.

Appointment of an impartial Hearing Officer.

Hearing rights.

Rights of Both Parties

The right to be accompanied and advised by counsel or by individuals with special knowledge and/or training.

The right to prohibit the introduction of evidence that has not been disclosed at least five (5) days prior to the hearing.

The right to obtain a written or electronic verbatim record of the hearing.

The right to obtain written findings of fact and decisions.

Rights of Parents Only

The right to have the child who is the subject of the hearing present.

The right to open the hearing to the public.

The right to an administrative appeal.

The right to civil action.

The right to timelines and convenience of hearing and review.

The right to determine the child's status during proceedings.

The right to surrogate parent provisions.

The right that the explanation also includes a description of:

The action proposed or refused by the agency.

An explanation of why the agency proposed or refused to take action.

A description of any options the agency considered and the reasons why these options were rejected.

A description of each evaluation procedure, test, record or report the agency used as a basis for its decision.

A description of any other factors relative to the agency's proposed action.

The right that the notice has been written in a language understandable to the general public and provided in the parent's native language or other mode of communication used by the parent, unless clearly not feasible.

The right that if the parent's native language or mode of communication is not a written language, the public agency has provided for the notice to be translated orally or by other means and has assured that the parent understands the content of the notice and there is written evidence to support this.

Appropriate Evaluation

The Hearing Officer should substantiate that the public agency has ensured that tests and other evaluation procedures:

Were provided and administered in the child's native language.

Have been validated for the purpose for which they are used.

Were administered by trained personnel.

Measure specific areas of educational need and are not merely those designed to provide a single general intelligence quotient.

Were selected and administered to represent accurately aptitude or achievement rather than the child's impaired sensory, manual or speaking skills (except where the test is specifically designed to measure those impairments).

Additionally, the public agency has ensured that:

No single procedure or instrument was used as the sole requirement in determining an educational program.

The evaluation was made by a multidisciplinary team or group, including at least one teacher or specialist with knowledge in the suspected area of disability.

The child was assessed in all areas related to the suspected disability including, when appropriate:

Health

Vision

Hearing

Social and emotional status

General Intelligence

Academic performance

Communicative status

Motor ability

Appropriate Placement Procedures

The Hearing Officer should substantiate that in making a placement decision the public agency has:

Based any decisions on information drawn from a variety of sources including aptitude and achievement tests, teacher recommendations, physical condition, social and cultural background, and adaptive behavior.

Ensured that the source of any information is documented and considered.

Ensured that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the evaluation data, and the placement options.

Ensured that the placement decision is made in compliance with the regulations on least restrictive environment (Wyoming Rules, Chapter XI, § 3, and 34 CFR 300.550). In brief, these requirements are:

To the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped.

Special classes, separate schooling, or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

A continuum of alternative placements exists and includes regular classes, special classes, special schools, home instruction, instruction in hospitals and institutions, and supplementary services such as resource rooms or itinerant instruction.

Each educational placement is determined at least annually, is based on the IEP, and is as close to the child's home as possible.

The continuum of services is available to the extent necessary to implement the IEP.

The child is educated in the school which he would attend if not handicapped unless the IEP requires other arrangements.

In selecting the least restrictive environment, consideration is given to any potentially harmful effects on the child or on the quality of services needed (including consideration of whether or not the placement of a specific handicapped child in a classroom may interfere with provision of instruction to other children).

Confidentiality of Information

The Hearing Officer should substantiate that the following confidentiality requirements of P.L. 94-142 and the Wyoming Rules, Appendix C have not been violated:

The agency must permit parents to inspect and review any educational records relating to their children which are collected, maintained, or used by the agency. The agency must comply with such a request prior to an IEP meeting or a hearing, and in no case more than forty-five (45) days after the request. The right to inspect records includes:

Right to a response from the public agency explaining and interpreting the records.

Right to obtain copies of the records, if failure to obtain copies would prevent inspection and review. (Fees may be charged for copies of the records if this does not prevent access.)

Right to have a representative inspect and review records.

The agency must maintain a record of access to records including the name, date, and purpose access was obtained.

The agency must, on request, provide parents with a list of the types and location of educational records.

Appointment of Surrogate Parents

The Hearing Officer should substantiate that the rights of the child are protected including, when necessary, the appointment of a surrogate parent when no parent can be identified, the whereabouts of the parents cannot be discovered, or the child is a ward of the State. (The Office

of Education has stated that agencies are not allowed to appoint surrogates when parents are uncooperative or nonresponsive.)

Requirement of Special Notice

The Hearing Officer should substantiate that the requirements of special notice have been met:

> The public agency must inform the parents of any free or low-cost legal and other relevant services available in the area if the parents request that information or if the parents or the agency initiates a hearing (Wyoming Rules, Chapter II, § 5(5)).

Although parent groups, such as the National Association for Retarded Citizens (NARC), and the Association for Children with Learning Disabilities (ACLD) and other advocate groups, are not generally thought of as legal representatives, they often provide legal service or referral and, therefore, may be considered a "relevant service."

Request for Further Information

The Hearing Officer may request further information from the parent or the public agency be provided him/her and the other party. If further information is requested by the Hearing Officer, specific time extensions of the forty-five (45) day requirement may be granted in accordance with Section 300.512(a) of the Federal Register and Chapter XI, § 5(11) of the Wyoming Rules.

An independent educational evaluation at public expense may be requested by the Hearing Officer in accordance with Section 300.503 (3)(d) of the Federal Register and Chapter XI, § 52 of the Wyoming Rules.

Chapter 5

HEARING PROCEDURES

The purpose of the hearing is to provide an open, orderly forum for both parties to present their views, question witnesses, and discuss the evidence. It is the responsibility of the Hearing Officer to insure that the proceedings serve such a purpose.

Sample Format K:

SAMPLE AGENDA

(date)

(time)

Meeting room of _____

(address)

I. Formal Call to Order

II. Introduction Statement by Hearing Officer

- A. Statement of open or closed hearing
- B. Introduction of Hearing Officer
- C. Introduction of participants for record
- D. Purpose of the Hearing

III. Opening of Formal Testimony

- A. Format
- B. Opening statement
  - 1. Petitioner
  - 2. Respondent
- C. Presentation of written evidence and testimony
  - 1. Petitioner
  - 2. Respondent

IV. Closing Statements by Hearing Officer

- A. Decision date
- B. Availability of verbatim record of hearing
- C. Procedures for appeal

Call to Order

The Hearing Officer should call the proceedings to order at the appointed time. At this time, the Hearing Officer should begin the recording of the hearing.

Opening Statement by Hearing Officer

Sample Format L:

SAMPLE OPENING STATEMENT

IMPARTIAL HEARING OFFICER: The Impartial Due Process Hearing on behalf of (student's name), by and through his/her (parent(s), guardian), is now convened at (time) on (date). The hearing is being held in the _____ located at (address).

The Impartial Hearing Officer presiding is: _____.

The Petitioner is _____, by and through his/her (parent(s), guardian), who is/are represented by _____. The Petitioner resides at _____. Counsel for the Petitioner is a resident attorney with the firm of _____ with officer located at _____.

The Respondent is the _____ DISTRICT whose central office is located at _____. _____, _____ for the (name of District/County) will represent the Respondent in this matter. He/she is accompanied by Counsel of Record, _____, who is with the firm of _____ located at _____.

The written request for this hearing, submitted in writing by (name of parent(s), guardian) on (date), pursuant to Section 504 of the Rehabilitation Act of 1973 (Public Law 94-142) and Wyoming State Board of Education Rules and Regulations Governing Programs and Services for Handicapped Children in Wyoming School Districts, indicated that he/she/they was/were initiating a formal request for a fair and impartial hearing before an impartial Hearing Officer.

The purpose of this impartial hearing is to provide an opportunity for both the parents and the school district to meet before an impartial Hearing Officer to resolve differences which could not be resolved by informal conference pursuant to Public Law 94-142 and Wyoming State Board of Education Rules. It is noted for the record that this hearing is (open/closed) as requested by (parent(s), guardian).*

*NOTE: If the hearing is closed, the Hearing Officer should excuse everyone except the principle parties involved in the hearing at this time. All witnesses should be asked to wait outside the hearing room until called to testify.

As Hearing Officer in this matter, it is my responsibility to:

1. Conduct this hearing in an orderly manner.
2. Provide an opportunity for full presentation of testimony and evidence from both sides.
3. Arrive at a decision based on the testimony and evidence presented during the hearing.

It should be noted for the record that this is not a court of law and matters involving technical points of law are not germane. This is an inappropriate forum for such matters.

It is germane and appropriate, however, that this hearing assures both the parents and the school district are given a full opportunity to present the reasons for their respective actions based solely on the evidence and testimony presented during the course of this hearing, and that this hearing results in an educational decision.

To assure that both parties involved in this hearing have a full opportunity to present their evidence and testimony regarding this matter, all comments will be directed to the Hearing Officer. Only the parties involved and the witnesses will be recognized by the Hearing Officer. There will be no comments from observers to these proceedings.

After I have asked the Petitioner, _____, a number of questions that must be entered into the record, the hearing will proceed as follows:

1. Each side (the Respondent or his/her representative, and the Petitioner, or his/her representative) will be given an opportunity to make a brief opening statement. The purpose of this statement is to specify the reasons for requesting this hearing and to indicate what the Respondent and the Petitioner expect as an outcome of the hearing. No evidence or testimony regarding the matter will be accepted during these opening statements. There will be no discussion of these opening remarks.

2. Following the opening statements, the Petitioner will be asked to present his/her witnesses and evidence. There will be an opportunity for examination, cross-examination, and re-examination of each witness. Witnesses will be called in the order requested by the Petitioner and the Respondent.

3. The Hearing Officer establishes jurisdiction by:

    a. determining that the child is handicapped according to the State Rules and Regulations; and
    b. determining that the hearing relates to the matters set out in Wyoming laws and P.L. 94-142 (see also Appendix E re: Jurisdiction of the Due Process Hearing Officer).

NOTE: The Hearing Officer, if he/she has had access to all materials prior to the hearing, should have determined these matters prior to the hearing. If so, statements to that effect would be read into the record and/or both Petitioner and Respondent may be asked to stipulate that the issue(s) are within the jurisdiction of the Hearing Officer.

4. The Hearing Officer should plan to call ten-minute recesses as needed. If a tape recorder is used, it should be within view of the Hearing Officer in order to determine easily when tapes need to be changed. The Hearing Officer should stop the proceedings when it is necessary to change tapes or to accommodate the stenographer's needs in any other way.

NOTE: As has been noted earlier, the use of a court reporter or certified stenographer has been found to be more efficient, and in the event of an appeal, the use of a court reporter or certified stenographer is more cost effective than the use of an electronic recording. Some hearing officers prefer to arrange for the court reporter or stenographer and to pay for them directly in order to minimize any possible charges that the verbatim transcript is inaccurate or incomplete.

Opening of Formal Testimony

1. Format

At this time, the Hearing Officer briefly reviews the format to be followed, the procedure to be utilized in presenting evidence and testimony, and the responsibility of the Hearing Officer to elicit further information, if necessary. All statements made during the hearing should be addressed to the Hearing Officer. This will serve to discourage discussion between the participants. (An obvious exception would be discussions between parties and their own counsel or expert.)

The format outline is:

a. Opening statements (respondent and petitioner);
b. Presentation of evidence and testimony;
    1) introduction
    2) examination
    3) cross-examination
    4) re-examination
    5) questions from hearing officer;
c. Closing statement by both parties; and
d. Final remarks by Hearing Officer.

2. Opening statements

The Hearing Officer reminds the parties that opening statements will not be discussed.

NOTE: If witnesses are to be "sworn in," the following phrase administered by the Hearing Officer or the Court Reporter (if a court reporter is used, it is preferable that he/she swear in witnesses) should suffice. Ask witness to raise his/her right hand and respond to the question: "Do you affirm that your statements will be accurate to the best of your knowledge?" or "Do you swear that the testimony you are about to give is the truth and the whole truth, so help you God?"

The Hearing Officer asks for opening statements from each party to summarize the issues as they see them and to specify what each anticipates as an outcome of the hearing.

a. Petitioner
b. Respondent

3. Presentation of evidence and witnesses

4. Testimony by witnesses:

a. The party who originates the hearing (petitioner) should present witnesses first.
b. As each witness is summoned, the Hearing Officer indicates where the witness is to sit (close to recorder or reporter) and requests that the witness state:
   1) name,
   2) address,
   3) position,
   4) relationship to child, and
   5) reason for appearance.
c. Hearing Officer may question witness regarding his/her credential because testimony will be used by Hearing Officer on findings of fact.
d. The Hearing Officer requests the petitioner to proceed with the eliciting of testimony from the witness.
e. At the completion of petitioner questioning, the Hearing Officer asks if the respondent wishes to question (cross-examine) the witness.
f. If the respondent does question the witness, the petitioner must be asked if he/she has further questions for the witness (this re-examination may be done to clarify any information brought out in cross-examination).
g. Following the re-examination, the Hearing Officer may ask the witness any questions he/she feels are necessary.
h. The Hearing Officer asks if there will be further need of the witness; if so, the witness is asked to remain to be called at a later time.
i. Otherwise, the Hearing Officer thanks the witness for the testimony and dismisses the witness.

5. Questioning witnesses

a. Only the party, the party's spokesperson, or the Hearing Officer may question witnesses.

b. Counsel appearing at the hearing to represent a witness may only advise his/her client and may not question witnesses.
c. At any time the Hearing Officer may interrupt the proceedings to stop unnecessarily hostile or irrelevant pursuits in the questioning.
d. At his/her discretion, the Hearing Officer may determine if questions or statements from others at the hearing should be permitted.

Special Considerations

1. Objections: The Hearing Officer should note any objections raised during the proceedings, and his/her rulings on them. (For example, if certain evidence were not admitted, it would not be reflected in the decision. The refusal to allow the evidence in the hearing should be noted in the final decision, however, so that if the Hearing Officer were in error, that could be argued on appeal.)

Sample Format M:

OBJECTIONS RAISED IN HEARING

Content of Objection	Ruling
1.	
2.	
3.	
4.	
5.	

2. Failure to appear:*

a. Parent or public agency representative: If one of the principle parties to the hearing fails to appear, the Hearing Officer may wish to adjourn the hearing to another date. However, the Hearing Officer may proceed with the hearing. Any decision emanating from such a hearing must be based solely on the evidence presented. A decision to continue or adjourn should be determined by the impartial Hearing Officer.

b. Witness: If a witness for either party fails to attend the hearing, the hearing should proceed with a notation for the record that the witness did not appear. The evidence about which the witness would have testified would be stricken from the record, and the party relying on that witness would have to build their case another way.

If information provided by a witness who fails to appear at the hearing is particularly relevant, the Hearing Officer may ask the other party if they wish to stipulate to (accept) the material. For example, if a psychological report is available and the psychologist fails to appear, the parties can agree to stipulate to the information as fact.

If a witness will be available at a later date and if both parties agree to meet again at that time, that witness's testimony could be taken by deposition and sent to the Hearing Officer in time to be considered in the decision.

NOTE: The Hearing Officer would have to ascertain if the deadlines could be met; if not, he/she would have to grant an extension of time to accommodate the hearing of the testimony for inclusion in the decision.

c. Requests for postponement: The Hearing Officer should ask for a statement of the reasons for the request for a postponement and must then decide on the merits of the request. Taking into consideration the purpose for such a hearing, it is generally advantageous to have both parties feel that they are adequately prepared. The timelines were mandated, however, to assure a timely decision on behalf of the handicapped child.

d. Challenges: If a Hearing Officer is challenged at the hearing by either party, the Hearing Officer should let the party present his/her argument, and then decide whether or not to disqualify him/herself. If the Hearing Officer does not disqualify him/herself, the hearing would proceed. (The ruling would be included in the

*See information above regarding the Compelling of a Witness.

record just as objections are reported.) Should the Hearing Officer receive a formal challenge prior to the hearing, he/she will need to make a formal reply for the benefit of the record. If there is no basis for the charge of partiality, bias, or an ex parte relationship, the Hearing Officer should continue with the hearing. It is unlikely that the charge of being unqualified will be made since only those who have "qualified" and have been placed on the roster of the State Board of Education can be selected to serve as a Hearing Officer. (For an example of a formal challenge received prior to a hearing and a formal response from a Hearing Officer, see Appendix G-4.)

Closing Statements by Parties

1. The Hearing Officer asks for closing statements from each party. These statements summarize the points that the parties have presented in support of their respective positions, and restate what each party expects as an outcome of the hearing:

    a. Petitioner's closing statement;
    b. Respondent's closing statement.

Final Remarks by Hearing Officer

The final remarks should include:

1. Hearing Officer indicates that the findings of fact and decision will be mailed to both parties and the Wyoming Department of Education within forty-five (45) days of the initial hearing request, unless the Hearing Officer has extended the time limit.

2. A verbatim record of the hearing will be available to the parents upon request to the school district or agency.

3. Procedures for appeal: The Hearing Officer should indicate the right of either party to request an impartial review by the State Department of Education, which will review the record; at the discretion of the Department of Education afford the parties the opportunity for oral and/or written arguments; and provide a written copy of the report to both parties within thirty (30) days of the request.

4. Hearing Officer indicates that the record of the hearing will be transcribed if there is an appeal of the decision.

Sample Format N:

SAMPLE FINAL REMARKS

IMPARTIAL HEARING OFFICER: (If appropriate) Before making a formal summary statement, I would like to express appreciation to all who have been involved in this hearing.

If, upon examination of the record, the Hearing Officer finds there is a need for further clarification of any point, Petitioner and Respondent will be asked to meet with the Hearing Officer at the same time to avoid the possibility of establishing an ex parte relationship with either party involved in this matter.

As Hearing Officer I will mail my decision to both parties within fifteen* days as required by Chapter XI, Section 5(11) of the Wyoming State Board of Education Rules and Regulations Governing Programs and Services For Handicapped Children In Wyoming School Districts and the Code of Federal Regulations, Part 300.512(a).

Either party if disassistified with the decision may request a state level review by contacting the Wyoming State Board of Education. Either party may appeal to a court of appropriate jurisdiction if dissatisfied with the final decision and order of the State Board of Education. *

It should be noted that (child's name) shall remain in his/her present educational placement during the pendency of any proceedings conducted pursuant to Section 300.513 of the Code of Federal Regulations and Chapter XI, Section 5(h)(4) of the Wyoming Rules and Regulations Governing Programs and Services For Handicapped Children In Wyoming School Districts unless the school/agency and the parents/guardian agree otherwise.

This hearing in the matter of (child's name), by and through his/her parents/guardian (Parent of guardian's name) versus the _____ School District is now adjourned.

*NOTE: The Hearing Officer may want to substitute "45 days from the time the written notice was received by the _____ school district." The use of 15 days is predicated upon the fact that the timeline displayed in Chapter 3 permits the hearing to be held by the 30th day. If an extension is granted by the Hearing Officer for just cause, the timeline will, of course, be extended. The Hearing Officer should, in any event, specify the date the decision will be mailed (by certified mail) to the principle parties involved.

*

Under current Wyoming procedures a request for a due process hearing goes directly to the State Superintendent's office. (See page iii for more detail.)

Chapter 6

DECISION

Purpose

The purpose of the decision is to settle a dispute or question by giving a judgment. A decision rendered by a Hearing Officer in a due process hearing must be a logical conclusion based on the evidence and testimony presented at the time of the hearing.

It is important to keep in mind the basic purposes for an impartial due process hearing:

1. To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs; and

2. To insure that the rights of handicapped children, their parents, and public educational agencies are protected.

Constraints

The Hearing Officer must write a decision based on the issue and the evidence.

1. The issue:

   The Hearing Officer is limited to deciding the presenting complaint and should not go beyond that issue in his/her decision. For example, if the parent's issue is that the agency used improper methods in evaluating the child and, therefore, the placement recommendation is invalid, the Hearing Officer should limit the decision to the issue of the evaluation procedure. (Another program placement would not be recommended by the Hearing Officer.)

2. The evidence:

   The Hearing Officer examines the evidence presented at the hearing, and after making the findings of fact, may ask that additional information be presented which was unavailable at the hearing. Such information will be shared with both parties without reconvening the hearing.

3. Public agency prerogative:

   The Hearing Officer must limit his/her decision to the type of placement in generic terms; the decision cannot request placement in a specific classroom. (The specific assignment to a classroom or teacher is a public agency prerogative.)

4. Preponderance of evidence:

   The decision should be based on a preponderance of evidence, because if the decision is appealed to the courts, the court will use the preponderance of evidence standard. The court may also use the "best interests of the child" standard so the Hearing Officer should always keep the child's best interest in mind when writing the decision.

Preparation of the Decision

1. Format of the decision:

   a. Rationale for format: A separate face-page for the identifying information is called for due to the federal requirements (34 CFR, 300.129) and Wyoming Rules, Appendix C regarding Confidentiality.

   b. "Personally identifiable" information refers to:
      1) the name of the child, the child's parents, or other family member(s);
      2) the address of the child;
      3) a personal identifier, such as the child's social security number or student number; or
      4) a list of personal characteristics or other information which would make it possible to identify the child with reasonable certainty (34 CFR, 300.129 and Wyoming Rules, Appendix C).

If the Hearing Officer places the personally identifiable information on a face-page, and refers to the parties as Petitioner and Respondent, the decision could be forwarded to the State advisory panel or other interested parties simply by removing the face-page rather than through the laborious process of deleting personally identifiable information throughout the report.

Sample Format O:

DECISION FORMAT

Personally identifiable information. (Place on separate face-page.)

General findings. Facts that child is handicapped under the statutes; that the hearing relates to the matters outlined in P.L. 94-142 and Wyoming Rules and Regulations Governing Programs and Services for Handicapped Children in Wyoming School Districts.

Findings of fact from Petitioner's witnesses and exhibits. (Statements of the real facts as determined by the Hearing Officer.)

Findings of fact from Respondent's witnesses and exhibits.

Decision. (The Hearing Officer's rulings based on the findings of fact and the preponderance of evidence.)

Procedure to follow for appeal.

2. Preparation and submittal of the decision:

The report should be prepared in two parts:

a. Face-page: Personally identifiable information:
   1) child's name;
   2) parent's name;
   3) address; and
   4) identifying information such as student number and social security number.

b. Body of the report: Findings of fact, decision and appeal procedures. (The report should be typed and three copies prepared for mailing.)

c. Submittal timeline: The submittal timeline is governed by the forty-five (45) day time limit on the overall proceedings, unless the time is extended by the Hearing Officer.

d. Conveyance of the decision: Each report should be sent Certified Mail, Return Receipt Requested.

e. The following parties should each receive a copy of the decision:
   1) the parent;
   2) the district/agency; and
   3) the State Director of Special Education.

f. If the decision is appealed, the Hearing Officer should be prepared to have the hearing record transcribed, and to certify the decision and verbatim record and send them to the Department of Education. Should either party appeal the State's report, the decision and verbatim record would be sent to the court hearing the matter.

Administrative Review

1. Right to appeal: If the hearing is conducted by a party other than the State education agency (SEA), either aggrieved party may appeal the findings and decision in the hearing to the SEA.

2. Conduct of the administrative review: The Department of Education official conducting the review shall:

   a. Examine the entire hearing record.
   b. Insure due process requirements.
   c. Seek additional evidence, if necessary. If another hearing is conducted, the hearing rights in 34 CFR 300.508 apply.
   d. At the reviewing officer's discretion, request additional oral or written argument.
   e. Make an independent decision on the due process issues.
   f. Give a written copy of the findings and decision to the parties.

   Such a decision by the reviewing official is final unless a party brings civil action.

Civil Action

1. Any party who does not have a right to an administrative review after a hearing (34 CFR 300.510), and any party disagreeing with the decision of the SEA reviewing officer, has the right to bring a civil action under 34 CFR § 300.615(e)(2).

Sample Format P:

FORM REQUESTING APPEAL FORMAT*

(Within fifteen (15) days of receipt of Hearing Officer's Decision)

Dear (State Superintendent of Public Instruction):

I (we) am/are requesting an administrative review of the decision rendered by the Hearing Officer. The specific grounds for this appeal are as follows:

Sincerely,

_____
(signature)

_____
(name)

_____
(date)

cc: State Director of
Special Education

*Can be sent with Hearing Officer decision (attached) materials. Under current Wyoming procedures this letter would not be appropriate since the due process hearing is conducted under the aegis of the State Superintendent. Under present procedures the agrieved party determine if all administrative remedies have been exhausted and, if appropriate, appeal to a civil court of appropriate jurisdiction.

Sample Format Q:

SAMPLE DECISION FORMAT

As you begin to write your decision:

1. Under what authority is this decision rendered?
2. What is the reason for the hearing?
3. What laws, rules, policies and regulations are pertinent to the issues of this case?
4. What are some of your statements of facts from the evidence and testimony?
5. How do the laws apply to these facts?
6. What is your specific decision and order?
7. What particular facts justify your decision?
8. Are all the facts mentioned above readily apparent from the transcript and the documents submitted?

_____, by and through
(name of student)

his/her _____
(parent(s), guardian)

Petitioner

vs.

_____
(name of District/County)

Respondent

IMPARTIAL HEARING OFFICER'S DECISION

Impartial Due Process Hearing held on

_____
(date)

_____
(District/County Offices)

_____
(address)

IMPARTIAL HEARING OFFICER: _____

Petitioner's Declaration:

Respondent's Declaration:

(separate page)

Findings of Fact

General Findings

Findings of Fact from Petitioner's Witnesses and Exhibits

1.

2.

3.

4.

5.

Findings of Fact from Respondent's Witnesses and Exhibits

1.

2.

3.

4.

5.

Decision and Order

This decision and order shall be binding on all parties to this hearing and shall be implemented without delay.

Either party has the right to appeal this decision to the State Board of Education within fifteen (15) days of receipt of the Hearing Officer's decision. If there is an appeal, the State Board of Education will conduct an impartial review of the hearing. Either party has the right to appeal the decision of the State Board of Education by initiating a civil action through the courts.

Signature of Impartial Hearing Officer

_____

_____

(date)

Sample decisions written by Hearing Officers are found in Appendix G-2. One sample is from an open hearing. Personally identifiable information has not been deleted. One sample is from a closed hearing, and personally identifiable information has, therefore, been deleted.

Additional information regarding the writing of a decision is found in Appendix H.

APPENDICES

APPENDICES

Appendix A -- Glossary

Appendix B -- Rules and Regulations for Public Law 94-142 (34 CFR, Part 300)

Appendix C -- Wyoming State Board of Education Rules and Regulations Governing Programs and Services for Handicapped Children in Wyoming School Districts

Appendix D -- Selected Statutes from the Wyoming Code of 1969 As Amended Pertaining to the Education of Handicapped Children

Appendix E -- Writing The Decision

Appendix F -- Wyoming State Board of Education Rules and Regulations Governing Entitlements Under Section 309 (e) of The Wyoming Education Code

Appendix G -- Resource Materials

- Appendix G-1 Hearing Officer Qualifications
- Appendix G-2 Sample Hearing Officer Decisions
- Appendix G-3 Pre-Hearing Conference (Order)
- Appendix G-4 Challenges to Impartiality of Hearing Officer

Appendix H -- Wyoming Code of Civil Procedures (Selected Sections)

Appendix I -- Wyoming Education Code, 1969 As Amended (Selected Section)

APPENDIX A

GLOSSARY

GLOSSARY

Administrative Board: The term is very broad and includes bodies exercising varied functions, some of which involve orders made or other acts done ex parte or without full hearing as to the operative facts, while others are done only after such a notice and hearing, and the functions of the former kind are plainly "administrative" and those of the latter are quasi judicial. (Black's Law Dictionary, 1968, p. 362.)

Administrative Remedy: Not judicial, but provided by commission or board created by legislative power. (Black's, p. 67.)

Conclusion of fact: An inference drawn from the subordinate or evidentiary facts. (Black's, p. 362.)

Due Process of Law: Law in its regular course of administration through the courts of justice. . . . due process of law in each particular case means such an exercise of the powers of the government as the settled maxims of law permit and sanction, and under such safeguards for the protection of individual rights as those maxims prescribe for the class of cases to which the one in question belongs. (Black's, p. 590.)

Evidence: Any species of proof . . . legally presented at the trail of an issue, by the act of the parties and through the medium of witnesses, records, documents, concrete objects, etc., for the purpose of inducing belief in the minds of the court or jury as to their contention . . . (Black's, p. 656.)

Expert witness: May be men of science educated in the art, or persons possessing special or peculiar knowledge acquired from practical experience . . . One possessing, with reference to particular subject, knowledge not acquired by ordinary persons . . . One skilled in any particular art, trade, or profession, being possessed of peculiar knowledge concerning the same, and one who has given subject in question particular study, practice or observation . . . (Black's, p. 688.)

Guardian ad litem: A guardian appointed by the court to represent in a particular lawsuit the interests of a party who is a minor or an incompetent person or of a person unborn or unascertained who may become interested in property involved in the litigation. (Black's, p. .)

Hearsay: Evidence not proceeding from the personal knowledge of the witness, but from the mere repetition of what he has heard others say. That which does not derive its value solely from the credit of the witness, but rests mainly on the veracity and competency of other persons. The very nature of the evidence shows its weakness, and it is admitted only in specified cases from necessity . . . It is second-hand evidence, as distinguished from original

evidence; it is the repetition at second-hand of what would be original evidence if given by the person who originally made the statement . . . Hearsay is a statement made by a person not called as a witness, received in evidence on the trial . . . (Black's, p. 852.)

IEP: . . . the term "individualized education program" means a written statement for a handicapped child that is developed and implemented in accordance with 300.341-300.349. (Public Law 94-142, 34 CFR § 300.340.)

Intermediate educational unit: . . . the term "intermediate educational unit" means any public authority, other than a local educational agency, which: (a) Is under the general supervision of a State educational agency; (b) Is established by State law for the purpose of providing free public education on a regional basis; and (c) Provides special education and related services to handicapped children within that State. (P.L. 94-142, 34 CFR, § 300.7.)

LEA: . . . the term "local educational agency" means a public board of education or other public authority legally constituted within a State for either administrative control or direction of, or to perform a service function for public elementary or secondary schools in a city, county, township, school district, or other political subdivision of a State, or such combination of school districts or counties as are recognized in a State as an administrative agency for its public elementary or secondary schools. Such term also includes any other public institution or agency having administrative control and direction of a public elementary or secondary school. (b) For the purposes of this part, the term "local educational agency" also includes intermediate educational units. (P.L. 94-142, 34 CFR, § 300.8.)

Material evidence (materiality): Such as is relevant and goes to the substantial matters in dispute, or has a legitimate and effective influence or bearing on the decision of the case . . . (Black's, p. 1128.)

Petition: A written address, embodying an application or prayer from the person or persons preferring it, to the power or body, or person to who it is presented, for the exercise of his or their authority in the redress of some wrong, or the grant of some favor, privilege, or license. (Black's, p. 1303.)

Petitioner: One for whom a petition is written.

Public agency: . . . the term "public agency" includes the State ecucational agency, local educational agencies, intermediate educational units, and any other political subdivisions of the State which are responsible for providing education to handicapped children. (P.L. 94-142, 34 CFR, § 300.11.)

Relevancy: Applicability to the issue joined. That quality of evidence which renders it properly applicable in determining the truth and falsity of the matters in issue between the parties to a suit . . . Two facts said to be relevant to each other when so related that according to the common course of events, one either taken by itself or in connection with other facts, proves or renders probable the past, present, or future existence or nonexistence of the other . . . (Black's, p. 1454.)

Res judicata: The doctrine or "res judicata" is that when rights of parties have been put in issue and litigated, resultant judgment, when it becomes final, conclusively establishes rights or parties respecting matters litigated (McGaffey v. Sudowitz, 10 Cal. Rptr. 862, 864, 189 C.A.2d 215). The "res judicata" doctrine bars any further action between same parties or their privies on same course of action once judgment has been rendered as to original claim (Leven v. Singer, 175 A2d.423, 431, 227 Md. 47). "A matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgment. A phrase of the civil law constantly quoted in the books" (Black's, p. 1470.)

Res ipsa loquitur: The thing (or evidence) speaks for itself (Black's, p. 1470.)

Respond: 1. To make or file an answer to a bill, libel, or appeal, in the character of a respondent . . . 2. To be liable or answerable; to make satisfaction or amends; as to "respond in damages." (Black's, p. 1475.)

SEA: State educational agency.

Surrogate parent: See guardian ad litem.

Voir Dire: L.Fr. To speak the truth. This phrase denotes the preliminary examination which the court may make of one presented as a witness or juror; where his competency, interest, etc. is objected to. (Black's, p. 1746.)

NOTE: Other definitions are found in the State and Federal Statutes and Rules and Regulations.

APPENDIX B

RULES AND REGULATIONS FOR PUBLIC LAW 94-142

(34 CFR, PART 300)

INDEX TO FEDERAL REGULATIONS

IN RE: DUE PROCESS

ZERO REJECT:

1. Sec. 300.300: SEA failure to insure compliance with dates-certain and ages-certain requirement

2. Sec. 300.302: SEA and LEA failure to comply with free residential placement requirement

3. Sec. 300.303: SEA and LEA failure to provide for proper functioning of hearing aids

4. Sec. 300.305: SEA and LEA failure to provide for program options including art, music, home economics, and vocational education

5. Sec. 300.306: SEA and LEA failure to provide nonacademic services

6. Sec. 300.307: SEA and LEA failure to provide physical education

7. Sec. 300.320, 321, 323, and 324: SEA and LEA failure to comply with service priorities requirement

8. Sec. 300.401: SEA failure to insure that children placed by LEA in private schools (a) receive special education and related services and (b) have all the rights of handicapped children served by the public schools

9. Sec. 300.403: If parents place the child in private school, SEA or LEA failure to provide services to the child according to Sec. 300.450-460, but either the SEA or the LEA may initiate a due process hearing on the appropriateness of an LEA program or the question of financial responsibility

10. Sec. 300.451: If a child is in private school by parent placement, SEA failure to provide for the child's participation in federally funded programs (failure to assure special education or related services) or SEA failure to insure that LEAs comply with Sec. 300.452-460

11. Sec. 300.452, 453, 455: LEA failure to (a) provide special education and related services to handicapped children in private school, (b) provide such children a genuine opportunity to participate in public programs, (c) provide them with special education and related service comparable in quality, scope, and participation to those for handicapped children in public programs, and (d) use funds consistent with requirements for nondiscrimination in public programs (per Sec. 300.456, 457, 458, 459, and 460)

NONDISCRIMINATORY EVALUATION:

1. Sec. 300.530: SEA or LEA failure to select and administer testing and evaluation materials and procedures that are not racially or culturally discriminatory

2. Sec. 300.531: SEA or LEA failure to do individualized evaluation (per Sec. 300.532) before initial placement

3. Sec. 300.532: SEA or LEA failure to comply with evaluation procedures before initial placement

4. Sec. 300.533: SEA or LEA failure to comply with placement procedures, including interpreting evaluations

5. Sec. 300.534: SEA of LEA failure to review the child's individualized education program (IEP) and perform reevaluation every three years or more often if warranted or requested by parent

INDIVIDUALIZED EDUCATION PROGRAMS:

1. Sec. 300.341: SEA failure to provide for IEPs for handicapped children in private schools

2. Sec. 300.342: SEA or LEA failure to comply with deadline for IEP development (at the beginning of the school year)

3. Sec. 300.343: SEA or LEA failure to initiate the meeting, have the conference when required, or review the IEP annually

4. Sec. 300.344: SEA or LEA failure to have all required parties at the IEP meeting

5. Sec. 300.345: SEA or LEA failure to provide for parent's participation at the IEP meeting

6. Sec. 300.346: SEA or LEA failure to write an IEP with proper content

7. Sec. 300.347: SEA or LEA failure with respect to handicapped children in private school to initiate or conduct an IEP meeting, have private school participation at the meeting, or review IEPs annually

8. Sec. 300.348: SEA or LEA failure with respect to children enrolled in both public and private schools to have an IEP meeting or have private school participation at the meeting

9. Sec. 300.349: SEA or LEA failure to provide special education and related services as required by the child's IEP

LEAST RESTRICTIVE ENVIRONMENT:

1. Sec. 300.550(b): SEA or LEA failure to comply with the LRE requirement

2. Sec. 300.551: SEA or LEA failure to insure a continuum of alternative placements, including separate education and resource or itinerant teachers

3. Sec. 300.552: SEA or LEA failure to make an annual determination of placement, based on the child's IEP, as close as possible to the child's home; make program alternatives available to the extent necessary to implement the child's IEP; place the child in the school he would attend if he were not handicapped, unless his IEP calls for a different placement; or consider any potential harmful effect of placement on the child or the quality of services he needs

4. Sec. 300.553: SEA or LEA failure to provide or arrange for nonacademic and extracurricular services and activities in the LRE

5. Sec. 300.554: SEA failure to implement the LRE for handicapped children in public and private institutions (other than schools)

PARENT PARTICIPATION:

1. Sec. 300.561: SEA failure to notify parents concerning the adoption of the state plan and amendments and major identification, location, and evaluation activities

2. Sec. 300.562: SEA or LEA failure to grant parents access to records concerning their children, upon request, and before the IEP meeting or due process hearing at which the issue is the child's identification, evaluation, or placement, and to comply with the required elements or parent access

3. Sec. 300.563: SEA or LEA failure to keep record of parental access

4. Sec. 300.566: SEA or LEA failure to charge reasonable fees for copying of records (not excessively high fees)

5. Sec. 300.567, 568, 569, and 570: SEA or LEA failure to amend records at parent's request

6. Sec. 300.573: SEA or LEA failure to destroy information not needed to serve the child, at parent's request

Education of the Handicapped Regulations
ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

(34 Code of Federal Regulations Part 300)

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Education of the Handicapped Regulations
ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN
(34 Code of Federal Regulations Part 300)

Subpart A—General

PURPOSE, APPLICABILITY, AND GENERAL PROVISIONS REGULATIONS

Reg. 300.1 Purpose.

The purpose of this part is:

(a) To insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their unique needs,

(b) To insure that the rights of handicapped children and their parents are protected,

(c) To assist States and localities to provide for the education of all handicapped children, and

(d) To assess and insure the effectiveness of efforts to educate those children.

(20 U.S.C. 1401 Note)

Reg. 300.2 Applicability to State, local, and private agencies.

(a) *States*. This part applies to each State which receives payments under Part B of the Education of the Handicapped Act.

(b) *Public agencies within the State*. The annual program plan is submitted by the State educational agency on behalf of the State as a whole. Therefore, the provisions of this part apply to all political subdivisions of the State that are involved in the education of handicapped children. These would include: (1) The State educational agency, (2) local educational agencies and intermediate educational units, (3) other State agencies and schools (such as Departments of Mental Health and Welfare and State schools for the deaf or blind), and (4) State correctional facilities.

(c) *Private schools and facilities*. Each public agency in the State is responsible for insuring that the rights and protections under this part are given to children referred to or placed in private schools and facilities by that public agency.

(See Regs. 300.400-300.403)
(20 U.S.C. 1412(1), (6); 1413(a); 1413(a)(4)(B))

Comment. The requirements of this part are binding on each public agency that has direct or delegated authority to provide special education and related services in a State that receives funds under Part B of the Act, regardless of whether that agency is receiving funds under Part B.

Reg. 300.3 Regulations that apply to Assistance to States for Education of Handicapped Children.

(a) *Regulations*. The following regulations apply to this program of Assistance to States for Education of Handicapped Children.

(2) The Education Division General Administrative Regulations (EDGAR) in 34 CFR Part 76 (State-Administered Programs) and Part 77 (Definitions).

(2) The regulations in this Part 300.

(b) *How to use regulations; how to apply for funds*. The "Introduction to Regulations of the Education Division" at the beginning of EDGAR includes general information to assist in—

(1) Using regulations that apply to Education Division programs; and

(2) Apply for assistance under an Education Division program.

(20 U.S.C. 1221e-3(a)(1))

[Amended in 45 Fed. Reg. 22531 (April 3, 1980).]

DEFINITIONS

Comment. Definitions of terms that are used throughout these regulations are included in this subpart. Other terms are defined in the specific subparts in which they are used. Below is a list of those terms and the specific sections and subparts in which they are defined:

Consent (Section 300.500 of Subpart E)
Destruction (Section 300.560 of Subpart E)
Direct services (Section 300.370(b)(1) of Subpart C)
Evaluation (Section 300.500 of Subpart E)
First priority children (Section 300.320(a) of Subpart C)
Independent educational evaluation (Section 300.503 of Subpart E)
Individualized education program (Section 300.340 of Subpart C)
Participating agency (Section 300.560 of Subpart E)
Personally identifiable (Section 300.500 of Subpart E)
Private school handicapped children (Section 300.450 of Subpart D)
Public expense (Section 300.503 of Subpart E)
Second priority children (Section 300.320(b) of Subpart C)
Special definition of "State" (Section 300.700 of Subpan G)
Support services (Section 300.370(b)(2) of Subpart C)

Reg. 300.4 Free appropriate public education.

As used in this part, the term "free appropriate public education" means special education and related services which:

(a) Are provided at public expense, under public supervision and direction, and without charge.

(b) Meet the standards of the State educational agency, including the requirements of this part,

(c) Include preschool, elementary school, or secondary school education in the State involved, and

(d) Are provided in conformity with an individualized education program which meets the requirements under Regs. 300.340-300.349 of Subpart C.

(20 U.S.C. 1401(18))

Reg. 300.5 Handicapped children.

(a) As used in this part, the term "handicapped children" means those children evaluated in accordance with Regs. 300.530-300.534 as being mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, other health impaired, deaf-blind, multi-handicapped, or as having specific learning disabilities, who because of those impairments need special education and related services.

(b) The terms used in this definition are defined as follows:

(1) "Deaf" means a hearing impairment which is so severe that the child is impaired in processing linguistic information through hearing, with or without amplification, which adversely affects educational performance.

(2) "Deaf-blind" means concomitant hearing and visual impairments, the combination of which causes such severe communication and other developmental and educational problems that they cannot be accommodated in special education programs solely for deaf or blind children.

(3) "Hard of Hearing" means a hearing impairment, whether permanent or fluctuating, which adversely affects a child's educational performance but which is not included under the definition of "deaf" in this section.

(4) "Mentally retarded" means significantly subaverage general intellectual functioning existing concurrently with deficits in adaptive behavior and manifested during the developmental period, which adversely affects a child's educational performance.

(5) "Multihandicapped" means concomitant impairments (such as mentally retarded-blind, mentally retarded-orthopedically impaired, etc.), the combination of which causes such severe educational problems that they cannot be accommodated in special education programs solely for one of the impairments. The term does not include deaf-blind children.

(6) "Orthopedically impaired" means a severe orthopedic impairment which adversely affects a child's educational performance. The term includes impairments caused by congenital anomaly (e.g., clubfoot, absence of some member, etc.), impairments caused by disease (e.g. poliomyelitis, bone tuberculosis, etc.), and impairments from other causes (e.g., cerebral palsy, amputations, and fractures or burns which cause contractures).

(7) "Other health impaired" means

(i) having an autistic condition which is manifested by severe communication and other developmental and educational problems; or

(ii) having limited strength, vitality or alertness, due to chronic or acute health problems such as a heart condition, tuberculosis, rheumatic fever, nephritis, asthma, sickle cell anemia, hemophilia, epilepsy, lead poisoning, leukemia, or diabetes, which adversely affects a child's educational performance.

(8) "Seriously emotionally disturbed" is defined as follows:

(i) The term means a condition exhibiting one or more of the following characteristics over a long period of time and to a marked degree, which adversely affects educational performance:

(A) An inability to learn which cannot be explained by intellectual, sensory, or health factors;

(B) An inability to build or maintain satisfactory interpersonal relationships with peers and teachers;

(C) Inappropriate types of behavior or feelings under normal circumstances;

(D) A general pervasive mood of unhappiness or depression; or

(E) A tendency to develop physical symptoms or fears associated with personal or school problems.

(ii) The term includes children who are schizophrenic. The term does not include children who are socially maladjusted, unless it is determined that they are seriously emotionally disturbed.

(9) "Specific learning disability" means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps, of mental retardation, of emotional disturbance, or of environmental, cultural, or economic disadvantage.

(10) "Speech impaired" means a communication disorder such as stuttering, impaired articulation, a language impairment, or a voice impairment, which adversely affects a child's educational performance.

(11) "Visually handicapped" means a visual impairment which, even with correction, adversely affects a child's educational performance. The term includes both partially seeing and blind children.

(20 U.S.C. 1401(1),(15))

[Subparagraph (b)(9) amended in 42 Fed. Reg. 65083 (Dec. 29, 1977).]

[Subparagraphs (b)(7) and (b)(8) amended in 46 Fed. Reg. 3865 (Jan. 16, 1981).]

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Reg. 300.6 Include.

As used in this part, the term "include" means that the items named are not all of the possible items that are covered, whether like or unlike the ones named.

(20 U.S.C. 1417(b))

Reg. 300.7 Intermediate educational unit.

As used in this part, the term "intermediate educational unit" means any public authority, other than a local educational agency, which:

(a) Is under the general supervision of a State educational agency;

(b) Is established by State law for the purpose of providing free public education on a regional basis; and

(c) Provides special education and related services to handicapped children within that State.

(20 U.S.C. 1401 (22))

Reg. 300.8 Local educational agency.

(a) For the purposes of this part, the term "local educational agency" also includes intermediate educational units.

(20 U.S.C. 1401 (8))

[Amended in 45 Fed. Reg. 22531 (April 3, 1980).]

Reg. 300.9 Native language.

As used in this part, the term "native language" has the meaning given that term by section 703(a)(2) of the Bilingual Education Act, which provides as follows:

The term "native language", when used with reference to a person of limited English-speaking ability, means the language normally used by that person, or in the case of a child, the language normally used by the parents of the child.

(20 U.S.C. 880b-1(a)(2); 1401(21))

Comment. Section 602(21) of the Education of the Handicapped Act states that the term "native language" has the same meaning as the definition from the Bilingual Education Act. (The term is used in the prior notice and evaluation sections under Reg. 300.505(b)(2) and Reg. 300.532(a)(1) of Subpart E.) In using the term, the Act does not prevent the following means of communication:

(1) In all direct contact with a child (including evaluation of the child), communication would be in the language normally used by the child and not that of the parents, if there is a difference between the two.

(2) If a person is deaf or blind, or has no written language, the mode of communication would be that normally used by the person (such as sign language, braille, or oral communication).

Reg. 300.10 Parent.

As used in this part, the term "parent" means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with Reg. 300.514. The term does not include the State if the child is a ward of the State.

(20 U.S.C. 1415)

Comment. The term "parent" is defined to include persons acting in the place of a parent, such as a grandmother or stepparent with whom a child lives, as well as persons who are legally responsible for a child's welfare.

Reg. 300.11 Public Agency.

As used in this part, the term "public agency" includes the State educational agency, local educational agencies, intermediate educational units, and any other political subdivisions of the State which are responsible for providing education to handicapped children.

(20 U.S.C. 1412(2)(B); 1412(6); (1413(a))

Reg. 300.12 Qualified.

As used in this part, the term "qualified" means that a person has met State educational agency approved or recognized certification, licensing, registration, or other comparable requirements which apply to the area in which he or she is providing special education or related services.

(20 U.S.C. 1417(b))

Reg. 300.13 Related services.

(a) As used in this part, the term "related services" means transportation and such developmental, corrective, and other supportive services as are required to assist a handicapped child to benefit from special education, and includes speech pathology and audiology, psychological services, physical and occupational therapy, recreation, early identification and assessment of disabilities in children, counseling services, and medical services for diagnostic or evaluation purposes. The term also includes school health services, social work services in schools, and parent counseling and training.

(b) The terms used in this definition are defined as follows:

(1) "Audiology" includes:

(i) Identification of children with hearing loss;

(ii) Determination of the range, nature, and degree of hearing loss, including referral for medical or other professional attention for the habilitation of hearing;

(iii) Provision of habilitative activities, such as language habilitation, auditory training, speech reading (lipreading), hearing evaluation, and speech conservation;

(iv) Creation and administration of programs for prevention of hearing loss;

(v) Counseling and guidance of pupils, parents, and teachers regarding hearing loss; and

(vi) Determination of the child's need for group and individual amplification, selecting and fitting an appropriate aid, and evaluating the effectiveness of amplification.

(2) "Counseling services" means services provided by qualified social workers, psychologists, guidance counselors, or other qualified personnel.

(3) "Early identification" means the implementation of a formal plan for identifying a disability as early as possible in a child's life.

(4) "Medical services" means services provided by a licensed physician to determine a child's medically related handicapping condition which results in the child's need for special education and related services.

(5) "Occupational therapy" includes:

(i) Improving, developing or restoring functions impaired or lost through illness, injury, or deprivation;

(ii) Improving ability to perform tasks for independent functioning when functions are impaired or lost; and

(iii) Preventing, through early intervention, initial or further impairment or loss of function.

(6) "Parent counseling and training" means assisting parents in understanding the special needs of their child and providing parents with information about child development.

(7) "Physical therapy" means services provided by a qualified physical therapist.

(8) "Psychological services" include:

(i) Administering psychological and educational tests, and other assessment procedures;

(ii) Interpreting assessment results;

(iii) Obtaining, integrating, and interpreting information about child behavior and conditions relating to learning.

(iv) Consulting with other staff members in planning school programs to meet the special needs of children as indicated by psychological tests, interviews, and behavioral evaluations; and

(v) Planning and managing a program of psychological services, including psychological counseling for children and parents.

(9) "Recreation" includes:

(i) Assessment of leisure function;

(ii) Therapeutic recreation services;

(iii) Recreation programs in schools and community agencies; and

(iv) Leisure education.

(10) "School health services" means services provided by a qualified school nurse or other qualified person.

(11) "Social work services in schools" include:

(i) Preparing a social or developmental history on a handicapped child;

(ii) Group and individual counseling with the child and family;

(iii) Working with those problems in a child's living situation (home, school, and community) that affect the child's adjustment in school; and

(iv) Mobilizing school and community resources to enable the child to receive maximum benefit from his or her educational program.

(12) "Speech pathology" includes:

(i) Identification of children with speech or language disorders;

(ii) Diagnosis and appraisal of specific speech or language disorders;

(iii) Referral for medical or other professional attention necessary for the habilitation of speech or language disorders;

(iv) Provisions of speech and language services for the habilitation or prevention of communicative disorders; and

(v) Counseling and guidance of parents, children, and teachers regarding speech and language disorders.

(13) "Transportation" includes:

(i) Travel to and from school and between schools,

(ii) Travel in and around school buildings, and

(iii) Specialized equipment (such as special or adapted buses, lifts, and ramps), if required to provide special transportation for a handicapped child.

(20 U.S.C. 1401(17))

Comment. With respect to related services, the Senate Report states:

The Committee bill provides a definition of "related services," making clear that all such related services may not be required for each individual child and that such term includes early identification and assessment of handicapping conditions and the provision of services to minimize the effects of such conditions.

(Senate Report No. 94-168, p. 12 (1975))

The list of related services is not exhaustive and may include other developmental, corrective, or supportive services (such as artistic and cultural programs, and art, music, and dance therapy), if they are required to assist a handicapped child to benefit from special education.

There are certain kinds of services which might be provided by persons from varying professional backgrounds and with a variety of operational titles, depending upon requirements in individual States. For example, counseling services might be provided by social workers, psychologists, or guidance counselors; and psychological testing might be done by qualified psychological

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examiners, psychometrists, or psychologists, depending upon State standards.

Each related service defined under this part may include appropriate administrative and supervisory activities that are necessary for program planning, management, and evaluation.

Reg. 300.14 Special education.

(a)(1) As used in this part, the term "special education" means specially designed instruction, at no cost to the parent, to meet the unique needs of a handicapped child, including classroom instruction, instruction in physical education, home instruction, and instruction in hospitals and institutions.

(2) The term includes speech pathology, or any other related service, if the service consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child, and is considered "special education" rather than a "related service" under State standards.

(3) The term also includes vocational education if it consists of specially designed instruction, at no cost to the parents, to meet the unique needs of a handicapped child.

(b) The terms in this definition are defined as follows:

(1) "At no cost" means that all specially designed instruction is provided without charge, but does not preclude incidental fees which are normally charged to nonhandicapped students or their parents as a part of the regular education program.

(2) "Physical education" is defined as follows:

(i) The term means the development of:

(A) Physical and motor fitness;

(B) Fundamental motor skills and patterns; and

(C) Skills in aquatics, dance, and individual and group games and sports (including intramural and lifetime sports).

(ii) The term includes special physical education, adapted physical education, movement education, and motor development.

(20 U.S.C. 1401(16))

(3) "Vocational education" means organized educational programs which are directly related to the preparation of individuals for paid or unpaid employment, or for additional preparation for a career requiring other than a baccalaureate or advanced degree.

(20 U.S.C. 1401(16))

Comment. (1) The definition of "special education" is a particularly important one under these regulations, since a child is not handicapped unless he or she needs special education. (See the definition of "handicapped children" in section 300.5.) The definition of "related services" (section 300.13) also depends on this definition, since a related service must be necessary for a child to benefit from special education. Therefore, if a child does not need special education, there can be no "related services," and the child (because not "handicapped") is not covered under the Act.

(2) The above definition of vocational education is taken from the Vocational Education Act of 1963, as amended by Pub. L. 94-482. Under that Act, "vocational education" includes industrial arts and consumer and homemaking education programs.

Subpart B—State Annual Program Plans and Local Applications

ANNUAL PROGRAM PLANS—GENERAL

Reg. 300.110 Condition of assistance.

In order to receive funds under Part B of the Act for any fiscal year, a State must submit an annual program plan to the Commissioner through its State educational agency.

(20 U.S.C. 1232c(b), 1412, 1413)

Reg. 300.111 Contents of plan.

Each annual program plan must contain the provisions required in this subpart.

(20 U.S.C. 1412, 1413, 1232c(b))

ANNUAL PROGRAM PLANS—CONTENTS

Reg. 300.121 Right to a free appropriate public education.

(a) Each annual program plan must include information which shows that the State has in effect a policy which insures that all handicapped children have the right to a free appropriate public education within the age ranges and timelines under Reg. 300.122.

(b) The information must include a copy of each State statute, court order, State Attorney General opinion, and other State document that shows the source of the policy.

(c) The information must show that the policy:

(1) Applies to all public agencies in the State;

(2) Applies to all handicapped children;

(3) Implements the priorities established under Reg. 300.127(a)(1) of this subpart; and

(4) Establishes timeliness for implementing the policy, in accordance with Reg. 300.122.

(20 U.S.C. 1412(1), (2)(B), (6); 1414(a)(3))

Reg. 300.122 Timeliness and ages for free appropriate public education.

(a) *General.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure that a free appropriate public education is available for all handicapped children aged three through eighteen within the State not later than September 1, 1978, and for all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Documents relating to timeliness.* Each annual program plan must include a copy of each statute, court order, attorney general decision, and other State document which demonstrates that the State has established timelines in accordance with paragraph (a) of this section.

(c) *Exception.* The requirement in paragraph (a) of this section does not apply to a State with respect to handicapped children aged three, four, five, eighteen, nineteen, twenty, or twenty-one to the extent that the requirement would be inconsistent with State law or practice, or the order of any court, respecting public education for one or more of those age groups in the State.

(d) *Documents relating to exceptions.* Each annual program plan must:

(1) Describe in detail the extent to which the exception in paragraph (c) of this section applies to the State, and

(2) Include a copy of each State law, court order, and other document which provides a basis for the exception.

(20 U.S.C. 1412(2)(B))

Reg. 300.123 Full educational opportunity goal.

Each annual program plan must include in detail the policies and procedures which the State will undertake, or has undertaken, in order to insure that the State has a goal of providing full educational opportunity to all handicapped children aged birth through twenty-one.

(20 U.S.C. 1412(2)(A))

Reg. 300.124 Full educational opportunity goal—data requirement.

Beginning with school year 1978-1979, each annual program plan must contain the following information:

(a) The estimated number of handicapped children who need special education and related services.

(b) For the current school year:

(1) The number of handicapped children aged birth through two, who are receiving special education and related services; and

(2) The number of handicapped children:

(i) Who are receiving a free appropriate public education,

(ii) Who need, but are not receiving a free appropriate public education,

(iii) Who are enrolled in public and private institutions and are receiving a free appropriate public education, and

(iv) Who are enrolled in public and private institutions and are not receiving a free appropriate public education.

(c)The estimated numbers of handicapped children who are expected to receive special education and related services during the next school year.

(d) A description of the basis used to determine the data required under this section.

(e) The data required by paragraphs (a), (b), and (c) of this section must be provided:

(1) For each disability category (except for children aged birth through two), and

(2) For each of the following age ranges: birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(20 U.S.C. 1412(2)(A))

Comment. In Part B of the Act, the term "disability" is used interchangeably with "handicapping condition". For consistency in this regulation, a child with a "disability" means a child with one of the impairments listed in the definition of "handicapped children" in Reg. 300.5, if the child needs special education because of the impairment. In essence, there is a continuum of impairments. When an impairment is of such a nature that the child needs special education, it is referred to as a disability, in these regulations, and the child is a "handicapped" child.

States should note that data required under this section are not to be transmitted to the Commissioner in personally identifiable form. Generally, except for such purposes as monitoring and auditing, neither the States nor the Federal Government should have to collect data under this part in personally identifiable form.

Reg. 300.125 Full educational opportunity goal—timetable.

(a) *General requirement.* Each annual program plan must contain a detailed timetable for accomplishing the goal of providing full educational opportunity for all handicapped children.

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(b) *Content of timetable.* (1) The timetable must indicate what percent of the total estimated number of handicapped children the State expects to have full educational opportunity in each succeeding school year.

(2) The data required under this paragraph must be provided:

(i) For each disability category (except for children aged birth through two), and

(ii) For each of the following age ranges: birth through two, three through five, six through seventeen, and eighteen through twenty-one.

(20 U.S.C. 1412(2)(A))

Reg. 300.126 Full educational opportunity goal—facilities, personnel, and services.

(a) *General requirement.* Each annual program plan must include a description of the kind and number of facilities, personnel, and services necessary throughout the State to meet the goal of providing full educational opportunity for all handicapped children. The State educational agency shall include the data required under paragraph (b) of this section and whatever additional data are necessary to meet the requirement.

(b) *Statistical description.* Each annual program plan must include the following data:

(1) The number of additional special class teachers, resource room teachers, and itinerant or consultant teachers needed for each disability category and the number of each of these who are currently employed in the State.

(2) The number of other additional personnel needed, and the number currently employed in the State, including school psychologists, school social workers, occupational therapists, physical therapists, home-hospital teachers, speech-language pathologists, audiologists, teacher aides, vocational education teachers, work study coordinators, physical education teachers, therapeutic recreation specialists, diagnostic personnel, supervisors, and other instructional and non-instructional staff.

(3) The total number of personnel reported under paragraph (b) (1) and (2) of this section, and the salary costs of those personnel.

(4) The number and kind of facilities needed for handicapped children and the number and kind currently in use in the State, including regular classes serving handicapped children, self-contained classes on a regular school campus, resource rooms, private special education day schools, public special education day schools, private special education residential schools, public special education residential schools, hospital programs, occupational therapy facilities, physical therapy facilities, public sheltered workshops, private sheltered workshops, and other types of facilities.

(5) The total number of transportation units needed for handicapped children, the number of transportation units designed for handicapped children which are in use in the State, and the number of handicapped children who use these units to benefit from special education.

(c) *Data categories.* The data required under paragraph (b) of this section must be provided as follows:

(1) Estimates for serving all handicapped children who require special education and related services,

(2) Current year data, based on the actual numbers of handicapped children receiving special education and related services (as reported under Subpart G), and

(3) Estimates for the next school year.

(d) *Rationale.* Each annual program plan must include a description of the means used to determine the number and salary costs of personnel.

(20 U.S.C. 1412(2)(A))

Reg. 300.127 Priorities.

(a) *General requirement.* Each annual program plan must include information which shows that:

(1) The State has established priorities which meet the requirements under Regs. 300.320-300.324 of Subpart C.

(2) The State priorities meet the timelines under Reg. 300.122 of this subpart, and

(3) The State has made progress in meeting those timelines.

(b) *Child data.* (1) Each annual program plan must show the number of handicapped children known by the State to be in each of the first two priority groups named in Reg. 300.321 of Subpart C:

(i) By disability category, and

(ii) By the age ranges in Reg. 300.124(e)(2) of this subpart.

(c) *Activities and resources.* Each annual program plan must show for each of the first two priority groups:

(1) The programs, services, and activities that are being carried out in the State,

(2) The Federal, State, and local resources that have been committed during the current school year, and

(3) The programs, services, activities, and resources that are to be provided during the next school year.

(20 U.S.C. 1412(3))

Reg. 300.128 Identification, location, and evaluation of handicapped children.

(a) *General requirement.* Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken to insure that:

(1) All children who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated; and

(2) A practical method is developed and implemented to determine which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(b) *Information.* Each annual program plan must:

(1) Designate the State agency (if other than the State educational agency) responsible for coordinating the planning and implementation of the policies and procedures under paragraph (a) of this section;

(2) Name each agency that participates in the planning and implementation and describe the nature and extent of its participation;

(3) Describe the extent to which:

(i) The activities described in paragraph (a) of this section have been achieved under the current annual program plan, and

(ii) The resources named for these activities in that plan have been used;

(4) Describe each type of activity to be carried out during the next school year, including the role of the agency named under paragraph (b)(1) of this section, timelines for completing those activities, resources that will be used, and expected outcomes;

(5) Describe how the policies and procedures under paragraph (a) of this section will be monitored to insure that the State educational agency obtains:

(i) The number of handicappped children within each disability category that have been identified, located, and evaluated, and

(ii) Information adequate to evaluate the effectiveness of those policies and procedures; and

(6) Describe the method the State uses to determine which children are currently receiving special education and related services and which children are not receiving special education and related services.

(20 U.S.C. 1412(2)(C)

Comment. The State is responsible for insuring that all handicapped children are identified, located, and evaluated, including children in all public and private agencies and institutions in the State. Collection and use of data are subject to the confidentiality requirements in Regs. 300.560-300.576.

Reg. 300.129 Confidentiality of personally identifiable information.

(a) Each annual program plan must include in detail the policies and procedures which the State will undertake or has undertaken in order to insure the protection of the confidentiality of any personally identifiable information collected, used, or maintained under this part.

(b) The Commissioner shall use the criteria in Regs. 300.560-300.576 of Subpart E to evaluate the policies and procedures of the State under paragraph (a) of this section.

(20 U.S.C. 1412(2)(D); 1417(c))

Comment. The confidentiality regulations were published in the Federal Register in final form on February 27, 1976 (41 FR 8603-8610), and met the requirements of Part B of the Act, as amended by Pub. L. 94-142. Those regulations are incorporated in Regs. 300.560-300.576 of Subpart E.

Reg. 300.130 Individualized education programs.

(a) Each annual program plan must include information which shows that each public agency in the State maintains records of the individualized education program for each handicapped child, and each public agency establishes, reviews, and revises each program as provided in Subpart C.

(b) Each annual program plan must include:

(1) A copy of each State statute, policy, and standard that regulates the manner in which individualized education programs are developed, implemented, reviewed, and revised, and

(2) The procedures which the State educational agency follows in monitoring and evaluating those programs.

(20 U.S.C. 1412(4))

Reg. 300.131 Procedural safeguards.

Each annual program plan must include procedural safeguards which insure that the requirements in Regs. 300.500-300.514 of Subpart E are met.

(20 U.S.C. 1412(5)(A))

Reg. 300.132 Least restrictive environment.

(a) Each annual program plan must include procedures which insure that the requirements in Regs. 300.550-300.556 of Subpart E are met.

(b) Each annual program plan must include the following information:

(1) The number of handicapped children in the State, within each disability category, who are participating in

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regular education programs, consistent with Regs. 300.550-300.556 of Subpart E.

(2) The number of handicapped children who are in separate classes or separate school facilities, or who are otherwise removed from the regular education environment.

(20 U.S.C. 1412(5)(B))

Reg. 300.133 Protection in evaluation procedures.

Each annual program plan must include procedures which insure that the requirements in Regs. 300.530-300.534 of Subpart E are met.

(20 U.S.C. 1412(5)(C))

Reg. 300.134 Responsibility of State educational agency for all educational programs.

(a) Each annual program plan must include information which shows that the requirements in Reg. 300.600 of Subpart F are met.

(b) The information under paragraph (a) of this section must include a copy of each State statute, State regulation, signed agreement between respective agency officials, and any other document that shows compliance with that paragraph.

(20 U.S.C. 1412(6))

Reg. 300.136 Implementation procedures—State educational agency.

Each annual program plan must describe the procedures the State educational agency follows to inform each public agency of its responsibility for insuring effective implementation of procedural safeguards for the handicapped children served by that public agency.

(20 U.S.C. 1412(6))

Reg. 300.137 Procedures for consultation.

Each annual program plan must include an assurance that in carrying out the requirements of section 612 of the Act, procedures are established for consultation with individuals involved in or concerned with the education of handicapped children, including handicapped individuals and parents of handicapped children.

(20 U.S.C. 1412(7)(A))

Reg. 300.138 Other Federal programs.

Each annual program plan must provide that programs and procedures are established to insure that funds received by the State or any public agency in the State under any other Federal program, including section 121 of the Elementary and Secondary Education Act of 1965 (20 U.S.C. 241e-2), section 305(b)(8) of that Act (20 U.S.C. 844a(b)(8)) or Title IV-C of that Act (20 U.S.C. 1831), and section 110(a) of the Vocational Education Act of 1963, under which there is specific authority for assistance for the education of handicapped children, are used by the State, only in a manner consistent with the goal of providing free appropriate public education for all handicapped children, except that nothing in this section limits the specific requirements of the laws governing those Federal programs.

(20 U.S.C. 1413(a)(2))

Reg. 300.139 Comprehensive system of personnel development.

Each annual program plan must include the material required under Regs. 300.380-300.387 of Subpart C.

(20 U.S.C. 1413(a)(3))

Reg. 300.140 Private schools.

Each annual program plan must include policies and procedures which insure that the requirements of Subpart D are met.

(20 U.S.C. 1413(a)(4))

Reg. 300.141 Recovery of funds for misclassified children.

Each annual program plan must include policies and procedures which insure that the State seeks to recover any funds provided under Part B of the Act for services to a child who is determined to be erroneously classified as eligible to be counted under section 611(a) or (d) of the Act.

(20 U.S.C. 1413(a)(5))

Reg. 300.144 Hearing on application.

Each annual program plan must include procedures to insure that the State educational agency does not take any final action with respect to an application submitted by a local educational agency before giving the local educational agency reasonable notice and an opportunity for a hearing.

(20 U.S.C. 1413(a)(8))

Reg. 300.145 Prohibition of commingling.

Each annual program plan must provide assurance satisfactory to the Commissioner that funds provided under Part B of the Act are not commingled with State funds.

(20 U.S.C. 1413(a)(9))

Comment. This assurance is satisfied by the use of a separate accounting system that includes an "audit trail" of the expenditure of the Part B funds. Separate bank accounts are not required. (See 34 CFR 76, Subpart F (Cash Depositories).)

Reg. 300.146 Annual evaluation.

Each annual program plan must include procedures for evaluation at least annually of the effectiveness of programs in meeting the educational needs of handicapped children, including evaluation of individualized education programs.

(20 U.S.C. 1413(a)(11))

Reg. 300.147 State advisory panel.

Each annual program plan must provide that the requirements of Regs. 300.650-300.653 of Subpart F are met.

(20 U.S.C. 1413(a)(12))

Reg. 300.148 Policies and procedures for use of Part B funds.

Each annual program plan must set forth policies and procedures designed to insure that funds paid to the State under Part B of the Act are spent in accordance with the provisions of Part B, with particular attention given to sections 611(b), 611(c), 611(d), 612(2), and 612(3) of the Act.

(20 U.S.C. 1413(a)(1))

Reg. 300.149 Description of use of Part B funds.

(a) *State allocation.* Each annual program plan must include the following information about the State's use of funds under Reg. 300.370 of Subpart C and Reg. 300.620 of Subpart F:

(1) A list of administrative positions, and a description of duties for each person whose salary is paid in whole or in part with those funds.

(2) For each position, the percentage of salary paid with those funds.

(3) A description of each administrative activity the State educational agency will carry out during the next school year with those funds.

(4) A description of each direct service and each support service which the State educational agency will provide during the next school year with those funds, and the activities the State advisory panel will undertake during that period with those funds.

(b) *Local educational agency allocation.* Each annual program plan must include:

(1) An estimate of the number and percent of local educational agencies in the State which will receive an allocation under this part (other than local educational agencies which submit a consolidated application),

(2) An estimate of the number of local educational agencies which will receive an allocation under a consolidated application,

(3) An estimate of the number of consolidated applications and the average number of local educational agencies per application, and

(4) A description of direct services the State educational agency will provide under Reg. 300.360 of Subpart C.

(20 U.S.C. 1232e(b)(1)(B)(ii))

Reg. 300.151 Additional information if the State educational agency provides direct services.

If a State educational agency provides free appropriate public education for handicapped children or provides them with direct services, its annual program plan must include the information required under Regs. 300.226-300.228, 300.231, and 300.235.

(20 U.S.C. 1413(b))

LOCAL EDUCATIONAL AGENCY APPLICATIONS—GENERAL

Reg. 300.180 Submission of application.

In order to receive payments under Part B of the Act for any fiscal year a local educational agency must submit an application to the State educational agency.

(20 U.S.C. 1414(a))

Reg. 300.182 The excess cost requirement.

A local educational agency may only use funds under Part B of the Act for the excess costs of providing special education and related services for handicapped children.

(20 U.S.C. 1414(a)(1), (a)(2)(B)(i))

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Reg. 300.183 Meeting the excess cost requirement.

(a) A local educational agency meets the excess cost requirement if it has on the average spent at least the amount determined under Reg. 300.184 for the education of each of its handicapped children. This amount may not include capital outlay or debt service.

(20 U.S.C. 1401(20); 1414(a)(1))

[Amended in 45 Fed. Reg. 22531 (April 3, 1980).]

Comment. The excess cost requirement means that the local educational agency must spend a certain minimum amount for the education of its handicapped children before Part B funds are used. This insures that children served with Part B funds have at least the same average amount spent on them, from sources other than Part B, as do the children in the school district taken as a whole.

The minimum amount that must be spent for the education of handicapped children is computed under a statutory formula. Section 300.184 implements this formula and gives a step-by-step method to determine the minimum amount. Excess costs are those costs of special education and related services which exceed the minimum amount. Therefore, if a local educational agency can show that it has (on the average) spent the minimum amount for the education of each of its handicapped children, it has met the excess cost requirement, and all additional costs are excess costs. Part B funds can then be used to pay for these additional costs, subject to other requirements of Part B (priorities, etc.). In the "Comment" under section 300.184, there is an example of how the minimum amount is computed.

Reg. 300.184 Excess costs—computation of minimum amount.

The minimum average amount a local educational agency must spend under Reg. 300.183 for the education of each of its handicapped children is computed as follows:

(a) Add all expenditures of the local educational agency in the preceding school year, except capital outlay and debt service:

(1) For elementary school students, if the handicapped child is an elementary school student, or

(2) For secondary school students, if the handicapped child is a secondary school student.

(b) From this amount, subtract the total of the following amounts spent for elementary school students or for secondary school students, as the case may be:

(1) Amounts the agency spent in the preceding school year from funds awarded under Part B of the Act and Titles I and VII of the Elementary and Secondary Education Act of 1965, and

(2) Amounts from State and local funds which the agency spent in the preceding school year for:

(i) Programs for handicapped children,

(ii) Programs to meet the special educational needs of educationally deprived children, and

(iii) Programs of bilingual education for children with limited English-speaking ability.

(c) Divide the result under paragraph (b) of this section by the average number of students enrolled in the agency in the preceding school year:

(1) In its elementary schools, if the handicapped child is an elementary school student, or

(2) In its secondary schools, if the handicapped child is a secondary school student.

(20 U.S.C. 1414(a)(1))

Comment. The following is an example of how a local educational agency might compute the average minimum amount it must spend for the education of each of its handicapped children, under Reg. 300.183. This example follows the formula in Reg. 300.184. Under the statute and regulations, the local educational agency must make one computation for handicapped children in its elementary schools and a separate computation for handicapped children in its secondary schools. The computation for handicapped school students would be done as follows:

a. First, the local educational agency must determine its total amount of expenditures for elementary school students from all sources—local, State, and Federal (including Part B)—in the preceding school year. Only capital outlay and debt service are excluded.

Example: A local educational agency spent the following amounts last year for elementary school students (including its handicapped elementary school students):

(1) From local tax funds	$2,750,000
(2) From State funds	7,000,000
(3) From Federal funds	750,000
	10,500,000

Of this total, $500,000 was for capital outlay and debt service relating to the education of elementary school students. This must be subtracted from total expenditures:

	$10,500,000
	—500,000
Total expenditures for elementary school students (less capital outlay and debt service)	10,000,000

b. Next, the local educational agency must subtract amounts spent for:

(1) Programs for handicapped children;

(2) Programs to meet the special educational needs of educationally deprived children; and

(3) Programs of bilingual education for children with limited English-speaking ability.

These are funds which the local educational agency actually spent, not funds received last year but carried over for the current school year.

Example: The local educational agency spent the following amounts for elementary school students last year:

(1) From funds under Title I of the Elementary and Secondary Education Act of 1965	$300,000
(2) From a special State program for educationally deprived children	200,000
(3) From a grant under Part B	200,000
(4) From State funds for the education of handicapped children	500,000
(5) From a locally-funded program for handicapped children	250,000
(6) From a grant for a bilingual education program under Title VII of the Elementary and Secondary Education Act of 1965	150,000
Total	1,600,000

A local educational agency would also include any other funds it got from Federal, State, or local sources for the three basic purposes: handicapped children, educationally deprived children, and bilingual education for children with limited English-speaking ability.)

This amount is subtracted from the local educational agency's total expenditure for elementary school students computed above:

$10,000,000
—1,600,000

8,400,000

c. The local educational agency next must divide by the average number of students enrolled in the elementary schools of the agency last year (including its handicapped students).

Example: Last year, an average of 7,000 students were enrolled in the agency's elementary schools. This must be divided into the amount computed under the above paragraph:

$8,400,000/7,000 students equals $1,200/student.

This figure is in the minimum amount the local educational agency must spend (on the average) for the education of each of its handicapped students. Funds under Part B may be used only for costs over and above this minimum. In this example, if the local educational agency has 100 handicapped elementary school students, it must keep records adequate to show that it has spent at least $120,000 for the education of those students (100 students times $1,200/student), not including capital outlay and debt service.

This $120,000 may come from any funds except funds under Part B, subject to any legal requirements that govern the use of those other funds.

If the local educational agency has handicapped secondary school students, it must do the same computation for them. However the amounts used in the computation would be those the local educational agency spent last year for the education of secondary school students, rather than for elementary school students.

Reg. 300.185 Computation of excess costs—consolidated application.

The minimum average amount under Reg. 300.183 where two or more local educational agencies submit a consolidated application, is the average of the combined minimum average amounts determined under Reg. 300.184 in those agencies for elementary or secondary school students, as the case may be.

(20 U.S.C. 1414(a)(1))

Reg. 300.186 Excess costs—limitation on use of Part B funds.

(a) The excess cost requirement prevents a local educational agency from using funds provided under Part B of the Act to pay for all of the costs directly attributable to the education of a handicapped child, subject to paragraph (b) of this section.

(b) The excess cost requirement does not prevent a local educational agency from using Part B funds to pay for all of the costs directly attributable to the education of a handicapped child in any of the age ranges three, four, five, eighteen, nineteen, twenty, or twenty-one, if no local or State funds are available for nonhandicapped children in that age range. However, the local educational agency must comply with the nonsupplanting and other requirements of this part in providing the education and services.

(20 U.S.C. 1402(20); 1414(a)(1))

Reg. 300.190 Consolidated applications.

(b) *Required applications.* A State educational agency may require local educational agencies to submit a consolidated application for payments under Part B of the Act if the State educational agency determines that an individual application submitted by a local educational agency will be disapproved because:

(1) The agency's entitlement is less than the $7,500 minimum required by section 611(c)(4)(A)(i) of the Act (Reg. 300.360(a)(1) of Subpart C); or

(2) The agency is unable to establish and maintain programs of sufficient size and scope to effectively meet the educational needs of handicapped children.

(c) *Size and scope of program.* The State educational agency shall establish standards and procedures for determinations under paragraph (b)(2) of this section.

(20 U.S.C. 1414(c)(1))

[Amended in 45 Fed. Reg. 22531 (April 3, 1980).]

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Reg. 300.192 State regulation of consolidated applications.

(a) The State educational agency shall issue regulations with respect to consolidated applications submitted under this part.

(b) The State educational agency's regulations must:

(1) Be consistent with Section 612(1)-(7) and Section 613(a) of the Act, and

(2) Provide participating local educational agencies with joint responsibilities for implementing programs receiving payments under this part.

(20 U.S.C. 1414(c)(2)(B))

(c) If an intermediate educational unit is required under State law to carry out this part, the joint responsibilities given to local educational agencies under paragraph (b)(2) of this section do not apply to the administration and disbursement of any payments received by the intermediate educational unit. Those administrative responsibilities must be carried out exclusively by the intermediate educational unit.

(20 U.S.C. 1414(c)(2)(C))

Reg. 300.193 State educational agency approval; disapproval.

(c) In carrying out its functions under this section, each State educational agency shall consider any decision resulting from a hearing under Regs. 300.506-300.513 of Subpart E which is adverse to the local educational agency involved in the decision.

(20 U.S.C. 1414(b)(3))

[Amended in 45 Fed. Reg. 22531 (April 3, 1980).]

Reg. 300.194 Withholding.

(a) If a State educational agency, after giving reasonable notice and an opportunity for a hearing to a local educational agency, decides that the local educational agency in the administration of an application approved by the State educational agency has failed to comply with any requirement in the application, the State educational agency, after giving notice to the local educational agency, shall:

(1) Make no further payments to the local educational agency until the State educational agency is satisfied that there is no longer any failure to comply with the requirement; or

(2) Consider its decision in its review of any application made by the local educational agency under Reg. 300.180;

(3) Or both.

(b) Any local educational agency receiving a notice from a State educational agency under paragraph (a) of this section is subject to the public notice provision in Reg. 300.592.

(20 U.S.C. 1414(b)(2))

LOCAL EDUCATIONAL AGENCY APPLICATIONS—CONTENTS

Reg. 300.220 Child identification.

Each application must include procedures which insure that all children residing within the jurisdiction of the local educational agency who are handicapped, regardless of the severity of their handicap, and who are in need of special education and related services are identified, located, and evaluated, including a practical method of determining which children are currently receiving needed special education and related services and which children are not currently receiving needed special education and related services.

(20 U.S.C. 1414(a)(1)(A))

Comment. The local educational agency is responsible for insuring that all handicapped children within its jurisdiction are identified, located, and evaluated, including children in all public and private agencies and institutions within that jurisdiction. Collection and use of data are subject to the confidentiality requirements in Regs. 300.560-300.576 of Subpart E.

Reg. 300.221 Confidentiality of personally identifiable information.

Each application must include policies and procedures which insure that the criteria in Regs. 300.560-300.574 of Subpart E are met.

(20 U.S.C. 1414(a)(1)(B))

Reg. 300.222 Full educational opportunity goal; timetable.

Each application must: (a) Include a goal of providing full educational opportunity to all handicapped childen, aged birth through 21, and

(b) Include a detailed timetable for accomplishing the goal.

(20 U.S.C. 1414(a)(1)(C), (D))

Reg. 300.223 Facilities, personnel, and services.

Each application must provide a description of the kind and number of facilities, personnel, and services necessary to meet the goal in Reg. 300.222.

(20 U.S.C. 1414(a)(1)(E))

Reg. 300.224 Personnel development.

Each application must include procedures for the implementation and use of the comprehensive system of personnel development established by the State educational agency under Reg. 300.140.

(20 U.S.C. 1414(a)(1)(C)(i))

Reg. 300.225 Priorities.

Each application must include priorities which meet the requirements of Regs. 300.320-300.324.

(20 U.S.C. 1414(a)(1)(C)(ii))

Reg. 300.226 Parent involvement.

Each application must include procedures to insure that, in meeting the goal under Reg. 300.222, the local educational agency makes provision for participation of and consultation with parents or guardians of handicapped children.

(20 U.S.C. 1414(a)(1)(C)(iii))

Reg. 300.227 Participation in regular education programs.

(a) Each application must include procedures to insure that to the maximum extent practicable, and consistent with Regs. 300.550-300.553 of Subpart E, the local educational agency provides special services to enable handicapped children to participate in regular educational programs.

(b) Each application must describe:

(1) The types of alternative placements that are available for handicapped children, and

(2) The number of handicapped children within each disability category who are served in each type of placement.

(20 U.S.C. 1414(a)(1)(C)(iv))

Reg. 300.229 Excess cost.

Each application must provide assurance satisfactory to the State educational agency that the local educational agency uses funds provided under Part B of the Act only for costs which exceed the amount computed under Reg. 300.184 and which are directly attributable to the education of handicapped children.

(20 U.S.C. 1414(a)(2)(B))

Reg. 300.230 Nonsupplanting.

(a) Each application must provide assurance satisfactory to the State educational agency that the local educational agency uses funds provided under Part B of the Act to supplement and, to the extent practicable, increase the level of State and local funds expended for the education of handicapped children, and in no case to supplant those State and local funds.

(b) To meet the requirement in paragraph (a) of this section:

(1) The total amount or average per capita amount of State and local school funds budgeted by the local educational agency for expenditures in the current fiscal year for the education of handicapped children must be at least equal to the total amount or average per capita amount of State and local school funds actually expended for the education of handicapped children in the most recent preceding fiscal year for which the information is available. Allowance may be made for:

(i) Decreases in enrollment of handicapped children; and

(ii) Unusually large amounts of funds expended for such long-term purposes as the acquisition of equipment and the construction of school facilities; and

(2) The local educational agency must not use Part B funds to displace State or local funds for any particular cost.

(20 U.S.C. 1414(a)(2)(B))

Comment. Under statutes such as Title I of the Elementary and Secondary Education Act of 1965, as amended, the requirement is to not supplant funds that "would" have been expended if the Federal funds were not available. The requirement under Part B, however, is to not supplant funds which have been "expended." This use of the past tense suggests that the funds referred to are those which the State or local agency actually spent at some time before the use of the Part B funds. Therefore, in judging compliance with this requirement, the Commissioner looks to see if Part B funds are used for any costs which were previously paid for with State or local funds.

The nonsupplanting requirement prohibits a local educational agency from supplanting State and local funds with Part B funds on either an aggregate basis or for a given expenditure. This means that if an LEA spent $100,000 for special education in FY 1977, it must budget at least $100,000 in FY 1978, unless one of the conditions in Reg. 300.230(b)(1) applies.

Whether a local educational agency supplants with respect to a particular cost would depend on the circumstances of the expenditure. For example, if a teacher's salary has been switched from local funding to Part B funding, this would appear to be supplanting. However, if that teacher was taking over a different position (such as a resource room teacher, for example), it would not be supplanting. Moreover, it might be important to consider whether the particular action of a local educational agency led to an increase in services for handicapped children over that which previously existed. The intent of the requirement is to insure that Part B funds are used to increase State and local efforts and are not used to take their place. Compliance would be judged with this aim in mind. The supplanting requirement is not intended to inhibit better services to handicapped children.

Reg. 300.231 Comparable services.

(a) Each application must provide assurance satisfactory to the State educational agency that the local educational agency meets the requirements of this section.

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(b) A local educational agency may not use funds under Part B of the Act to provide services to handicapped children unless the agency uses State and local funds to provide services to those children which, taken as a whole, are at least comparable to services provided to other handicapped children in that local educational agency.

(c) Each local educational agency shall maintain records which show that the agency meets the requirement in paragraph (b) of this section.

(20 U.S.C. 1414(a)(2)(C))

Comment. Under the "comparability" requirement, if State and local funds are used to provide certain services, those services must be provided with State and local funds to all handicapped children in the local educational agency who need them. Part B funds may then be used to supplement existing services, or to provide additional services to meet special needs. This, of course, is subject to the other requirements of the Act, including the priorities under Regs. 300.320-300.324.

Reg. 300.235 Individualized education program.

Each application must include procedures to assure that the local educational agency complies with Regs. 300.340-300.349 of Subpart C.

(20 U.S.C. 1414(a)(5))

Reg. 300.237 Procedural safeguards.

Each application must provide assurance satisfactory to the State educational agency that the local educational agency has procedural safeguards which meet the requirements of Regs. 300.500-300.514 of Subpart E.

(20 U.S.C. 1414(a)(7))

Reg. 300.238 Use of Part B funds.

Each application must describe how the local educational agency will use the funds under Part B of the Act during the next school year.

(20 U.S.C. 1414(a))

Reg. 300.240 Other requirements.

Each local application must include additional procedures and information which the State educational agency may require in order to meet the State annual program plan requirements under Regs. 300.120-300.151.

(20 U.S.C. 1414(a)(6))

APPLICATION FROM SECRETARY OF INTERIOR

Reg. 300.260 Submission of annual application; approval.

In order to receive payments under this part, the Secretary of Interior shall submit an annual application which:

(a) Meets applicable requirements of Section 614(a) of the Act;

(b) Includes monitoring procedures which are consistent with Reg. 300.601; and

(c) Includes other material as agreed to by the Commissioner and the Secretary of Interior.

(20 U.S.C. 1411(f))

Reg. 300.261 Public participation.

In the development of the application for the Department of Interior, the Secretary of Interior shall provide for public participation consistent with Regs. 300.280-300.284.

(20 U.S.C. 1411(f))

Reg. 300.262 Use of Part B funds.

(a) The Department of Interior may use five percent of its payments in any fiscal year, or $200,000, whichever is greater, for administrative costs in carrying out the provisions of this Part.

(b) The remainder of the payments to the Secretary of the Interior in any fiscal year must be used in accordance with the priorities under Regs. 300.320-300.324 of Subpart C.

(20 U.S.C. 1411(f))

Reg. 300.263 Applicable regulations.

The Secretary of the Interior shall comply with the requirements under Subparts C, E, and F.

(20 U.S.C. 1411(f)(2))

PUBLIC PARTICIPATION

Reg. 300.280 Public hearings before adopting an annual program plan.

(a) Prior to its adoption of an annual program plan, the State educational agency shall:

(1) Make the plan available to the general public,

(2) Hold public hearings, and

(3) Provide an opportunity for comment by the general public on the plan.

(20 U.S.C. 1412(7))

Reg. 300.281 Notice.

(a) The State educational agency shall provide notice to the general public of the public hearings.

(b) The notice must be in sufficient detail to inform the public about:

(1) The purpose and scope of the annual program plan and its relation to Part B of the Education of the Handicapped Act,

(2) The availability of the annual program plan,

(3) The date, time, and location of each public hearing,

(4) The procedures for submitting written comments about the plan, and

(5) The timetable for developing the final plan and submitting it to the Commissioner for approval.

(c) The notice must be published or announced:

(1) In newspapers or other media, or both, with circulation adequate to notify the general public about the hearings, and

(2) Enough in advance of the date of the hearings to afford interested parties throughout the State a reasonable opportunity to participate.

(20 U.S.C. 1412(7))

Reg. 300.282 Opportunity to participate; comment period.

(a) The State educational agency shall conduct the public hearings at times and places that afford interested parties throughout the State a reasonable opportunity to participate.

(b) The plan must be available for comment for a period of at least 30 days following the date of the notice under Reg. 300.281.

(20 U.S.C. 1412(7))

Reg. 300.283 Review of public comments before adopting plan.

Before adopting its annual program plan, the State educational agency shall:

(a) Review and consider all public comments, and

(b) Make any necessary modifications in the plan.

(20 U.S.C. 1412(7))

Reg. 300.284 Publication and availability of approved plan.

After the Commissioner approves an annual program plan, the State educational agency shall give notice in newspapers or other media, or both, that the plan is approved. The notice must name places throughout the State where the plan is available for access by any interested person.

(20 U.S.C. 1412(7))

Subpart C—Services

FREE APPROPRIATE PUBLIC EDUCATION

Reg. 300.300 Timelines for free appropriate public education.

(a) *General.* Each State shall insure that free appropriate public education is available to all handicapped children aged three through eighteen within the State not later than September 1, 1978, and to all handicapped children aged three through twenty-one within the State not later than September 1, 1980.

(b) *Age ranges 3-5 and 18-21.* This paragraph provides rules for applying the requirement in paragraph (a) of this section to handicapped children aged three, four, five, eighteen, nineteen, twenty, and twenty-one:

(1) If State law or a court order requires the State to provide education for handicapped children in any disability category in any of these age groups, the State must make a free appropriate public education available to all handicapped children of the same age who have that disability.

(2) If a public agency provides education to non-handicapped children in any of these age groups, it must make a free appropriate public education available to at least a proportionate number of handicapped children of the same age.

(3) If a public agency provides education to 50 percent or more of its handicapped children in any disability category in any of these age groups, it must make a free appropriate public education available to all of its handicapped children of the same age who have that disability.

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(4) If a public agency provides education to a handicapped child in any of these age groups, it must make a free appropriate public education available to that child and provide that child and his or her parents all of the rights under Part B of the Act and this part.

(5) A State is not required to make a free appropriate public education available to a handicapped child in one of these age groups if:

(i) State law expressly prohibits, or does not authorize, the expenditure of public funds to provide education to non-handicapped children in that age group; or

(ii) The requirement is inconsistent with a court order which governs the provision of free public education to handicapped children in that State.

(20 U.S.C. 1412(2)(B); Sen. Rept. No. 94-168 p. 19 (1975))

Comment. 1. The requirement to make free appropriate public education available applies to all handicapped children within the State who are in the age ranges required under Reg. 300.300 and who need special education and related services. This includes handicapped children already in school and children with less severe handicaps, who are not covered under the priorities under Reg. 300.321.

2. In order to be in compliance with Reg. 300.300, each State must insure that the requirement to identify, locate, and evaluate all handicapped children is fully implemented by public agencies throughout the State. This means that before September 1, 1978, every child who has been referred or is on a waiting list for evaluation (including children in school as well as those not receiving an education) must be evaluated in accordance with Regs. 300.530-300.533 of Subpart E. If, as a result of the evaluation, it is determined that a child needs special education and related services, an individualized education program must be developed for the child by September 1, 1978, and all other applicable requirements of this part must be met.

3. The requirement to identify, locate, and evaluate handicapped children (commonly referred to as the "child find system") was enacted on August 21, 1974, under Pub. L. 93-380. While each State needed time to establish and implement its child find system, the four year period between August 21, 1974, and September 1, 1978, is considered to be sufficient to insure that the system is fully operational and effective on a Statewide basis.

Under the statute, the age range for the child find requirement (0-21) is greater than the mandated age range for providing free appropriate public education (FAPE). One reason for the broader age requirement under "child find" is to enable States to be aware of and plan for younger children who will require special education and related services. It also ties in with the full educational opportunity goal requirement, which has the same age range as child find. Moreover, while a State is not required to provide "FAPE" to handicapped children below the age ranges mandated under Reg. 300.300, the State may, at its discretion, extend services to those children, subject to the requirements on priorities under Regs. 300.320-300.324.

Reg. 300.301 Free appropriate public education—methods and payments.

(a) Each State may use whatever State, local, Federal, and private sources of support are available in the State to meet the requirements of this part. For example, when it is necessary to place a handicapped child in a residential facility, a State could use joint agreements between the agencies involved for sharing the cost of that placement.

(b) Nothing in this part relieves an insurer or similar third party from an otherwise valid obligation to provide or to pay for services provided to a handicapped child.

(20 U.S.C. 1401(18); 1412(2)(B))

Reg. 300.302 Residential placement.

If placement in a public or private residential program is necessary to provide special education and related services to a handicapped child, the program, including non-medical care and room and board, must be at no cost to the parents of the child.

(20 U.S.C. 1412(2)(B); 1413(a)(4)(B))

Comment. This requirement applies to placements which are made by public agencies for educational purposes, and includes placements in State-operated schools for the handicapped, such as a State school for the deaf or blind.

Reg. 300.303 Proper functioning of hearing aids.

Each public agency shall insure that the hearing aids worn by deaf and hard of hearing children in school are functioning properly.

(20 U.S.C. 1412(2)(B))

Comment. The report of the House of Representatives on the 1978 appropriation bill includes the following statement regarding hearing aids:

In its report on the 1976 appropriation bill the Committee expressed concern about the condition of hearing aids worn by children in public schools. A study done at the Committee's direction by the Bureau of Education for the Handicapped reveals that up to one-third of the hearing aids are malfunctioning. Obviously, the Committee expects the Office of Education will ensure that hearing impaired school children are receiving adequate professional assessment, follow-up and services.

(House Report No. 95-381, p. 67 (1977))

Reg. 300.304 Full educational opportunity goal.

(a) Each State educational agency shall insure that each public agency establishes and implements a goal of providing full educational opportunity to all handicapped children in the area served by the public agency.

(b) Subject to the priority requirements under Regs. 300.320-300.324, a State or local educational agency may use Part B funds to provide facilities, personnel, and services necessary to meet the full educational opportunity goal.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C))

Comment. In meeting the full educational opportunity goal, the Congress also encouraged local educational agencies to include artistic and cultural activities in programs supported under this part, subject to the priority requirements under Regs. 300.320-300.324. This point is addressed in the following statements from the Senate Report on Pub. L. 94-142:

The use of the arts as a teaching tool for the handicapped has long been recognized as a viable, effective way not only of teaching special skills, but also of reaching youngsters who had otherwise been unteachable. The Committee envisions that programs under this bill could well include an arts component and, indeed, urges that local educational agencies include the arts in programs for the handicapped funded under this Act. Such a program could cover both appreciation of the arts by the handicapped youngsters, and the utilization of the arts as a teaching tool per se.

Museum settings have often been another effective tool in the teaching of handicapped children. For example, the Brooklyn Museum has been a leader in developing exhibits utilizing the heightened tactile sensory skill of the blind. Therefore, in light of the national policy concerning the use of museums in Federally supported education programs enunciated in the Education Amendments of 1974, the Committee also urges local educational agencies to include museums in programs for the handicapped funded under this Act.

(Senate Report No. 94-168, p. 13 (1975))

Reg. 300.305 Program options.

Each public agency shall take steps to insure that its handicapped children have available to them the variety of educational programs and services available to nonhandicapped children in the area served by the agency, including art, music, industrial arts, consumer and homemaking education, and vocational education.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C))

Comment. The above list of program options is not exhaustive, and could include any program or activity in which nonhandicapped students participate. Moreover, vocational education programs must be specially designed if necessary to enable a handicapped student to benefit fully from those programs; and the set-aside funds under the Vocational Education Act of 1963, as amended by Pub. L. 94-482, may be used for this purpose. Part B funds may also be used, subject to the priority requirements under Regs. 300.320-300.324.

Reg. 300.306 Nonacademic services.

(a) Each public agency shall take steps to provide nonacademic and extracurricular services and activities in such manner as is necessary to afford handicapped children an equal opportunity for participation in those services and activities.

(b) Nonacademic and extracurricular services and activities may include counseling services, athletics, transportation, health services, recreational activities, special interest groups or clubs sponsored by the public agency, referrals to agencies which provide assistance to handicapped persons, and employment of students, including both employment by the public agency and assistance in making outside employment available.

(20 U.S.C. 1412(2)(A); 1414(a)(1)(C))

Reg. 300.307 Physical education.

(a) *General.* Physical education services, specially designed if necessary, must be made available to every handicapped child receiving a free appropriate public education.

(b) *Regular physical education.* Each handicapped child must be afforded the opportunity to participate in the regular physical education program available to nonhandicapped children unless:

(1) The child is enrolled full time in a separate facility; or

(2) The child needs specially designed physical education, as prescribed in the child's individualized education program.

(c) *Special physical education.* If specially designed physical education is prescribed in a child's individualized education program, the public agency responsible for the education of that child shall provide the services directly, or make arrangements for it to be provided through other public or private programs.

(d) *Education in separate facilities.* The public agency responsible for the education of a handicapped child who is enrolled in a separate facility shall insure that the child receives appropriate physical education services in compliance with paragraphs (a) and (c) of this section.

(20 U.S.C. 1401(16); 1412(5)(B); 1414(a)(6))

Comment. The Report of the House of Representatives on Pub. L. 94-142 includes the following statement regarding physical education:

Special education as set forth in the Committee bill includes instruction in physical education, which is provided as a matter of course to all nonhandicapped children enrolled in public elementary and secondary schools. The Committee is concerned that although these services are available to and required of all children in our school systems, they are often viewed as a luxury for handicapped children.

* * *

The Committee expects the Commissioner of Education to take whatever action is necessary to assure that physical education ser-

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vices are available to all handicapped children, and has specifically included physical education within the definition of special education to make clear that the Committee expects such services, specially designed where necessary, to be provided as an integral part of the educational program of every handicapped child.

(House Report No. 94-332, p. 9 (1975))

PRIORITIES IN THE USE OF PART B FUNDS

Reg. 300.320 Definitions of "first priority children" and "second priority children."

For the purposes of Regs. 300.321-300.324, the term:

(a) "First priority children" means handicapped children who:

(1) Are in an age group for which the State must make available free appropriate public education under Reg. 300.300; and

(2) Are not receiving any education.

(b) "Second priority children" means handicapped children, within each disability, with the most severe handicaps who are receiving an inadequate education.

(20 U.S.C. 1412(3))

Comment. After September 1, 1978, there should be no second priority children, since States must insure, as a condition of receiving Part B funds for fiscal year 1979, that all handicapped children will have available a free appropriate public education by that date.

NOTE—The term "free appropriate public education," as defined in Reg. 300.4 of Subpart A, means "special education and related services which * * * are provided in conformity with an individualized education program. * * *."

New "First priority children" will continue to be found by the State after September 1, 1978 through on-going efforts to identify, locate, and evaluate all handicapped children.

Reg. 300.321 Priorities.

(a) Each State and local educational agency shall use funds provided under Part B of the Act in the following order of priorities:

(1) To provide free appropriate public education to first priority children, including the identification, location, and evaluation of first priority children.

(2) To provide free appropriate public education to second priority children, including the identification, location, and evaluation of second priority children.

(3) To meet the other requirements in this part.

(b) The requirements of paragraph (a) of this section do not apply to funds which the State uses for administration under Reg. 300.620.

(20 U.S.C. 1411 (b)(1)(B), (b)(2)(B), (c)(1)(B), (c)(2)(A)(ii))

(c) State and local educational agencies may not use funds under Part B of the Act for preservice training.

(20 U.S.C. 1413(a)(3); Senate Report No. 94-168, p. 34 (1975))

Comment. Note that a State educational agency as well as local educational agencies must use Part B funds (except the portion used for State administration) for the priorities. A State may have to set aside a portion of its Part B allotment to be able to serve newly identified first priority children.

After September 1, 1978, Part B funds may be used:

(1) To continue supporting child identification, location, and evaluation activities;

(2) To provide free appropriate public education to newly identified first priority children;

(3) To meet the full educational opportunities goal required under § 300.304, including employing additional personnel and providing in-service training, in order to increase the level, intensity and quality of services provided to individual handicapped children; and

(4) To meet the other requirements of Part B.

Reg. 300.322 First priority children—school year 1977-1978.

(a) In school year 1977-1978, if a major component of a first priority child's proposed educational program is not available (for example, there is no qualified teacher), the public agency responsible for the child's education shall:

(1) Provide an interim program of services for the child; and

(2) Develop an individualized education program for full implementation no later than September 1, 1978.

(b) A local educational agency may use Part B funds for training or other support services in school year 1977-1978 only if all of its first priority children have available to them at least an interim program of services.

(c) A State educational agency may use Part B funds for training or other support services in school year 1977-1978 only if all first priority children in the State have available to them at least an interim program of services.

(20 U.S.C. 1411(b), (c))

Comment. This provision is intended to make it clear that a State or local educational agency may not delay placing a previously unserved (first priority) child until it has, for example, implemented an in-service training program. The child must be placed. After the child is in at least an interim program, the State or local educational agency may use Part B funds for training or other support services needed to provide that child with a free appropriate public education.

Reg. 300.323 Services to other children.

If a State or a local educational agency is providing free appropriate public education to all its first priority children, that State or agency may use funds provided under Part B of the Act:

(a) To provide free appropriate public education to handicapped children who are not receiving any education and who are in the age groups not covered under Reg. 300.300 in that State; or

(b) To provide free appropriate public education to second priority children; or

(c) Both.

(20 U.S.C. 1411(b)(1)(B), (b)(2)(B), (c)(2)(A)(ii))

Reg. 300.324 Application of local educational agency to use funds for the second priority.

A local educational agency may use funds provided under Part B of the Act for second priority children, if it provides assurance satisfactory to the State educational agency in its application (or an amendment to its application):

(a) That all first priority children have a free appropriate public education available to them;

(b) That the local educational agency has a system for the identification, location, and evaluation of handicapped children, as described in its application; and

(c) That whenever a first priority child is identified, located, and evaluated, the local educational agency makes available a free appropriate public education to the child.

(20 U.S.C. 1411(b)(1)(B), (c)(1)(B); 1414(a)(1)(C)(ii))

INDIVIDUALIZED EDUCATION PROGRAMS

Reg. 300.340 Definition.

As used in this part, the term "individualized education program" means a written statement for a handicapped child that is developed and implemented in accordance with Regs. 300.341-300.349.

(20 U.S.C. 1401(19))

Reg. 300.341 State educational agency responsibility.

(a) *Public agencies.* The State educational agency shall insure that each public agency develops and implements an individualized education program for each of its handicapped children.

(b) *Private schools and facilities.* The State educational agency shall insure that an individualized education program is developed and implemented for each handicapped child who:

(1) Is placed in or referred to a private school or facility by a public agency; or

(2) Is enrolled in a parochial or other private school and receives special education or related services from a public agency.

(20 U.S.C. 1412(4), (6); 1413(a)(4))

Comment. This section applies to all public agencies, including other State agencies (e.g., departments of mental health and welfare), which provide special education to a handicapped child either directly, by contract or through other arrangements. Thus, if a State welfare agency contracts with a private school or facility to provide special education to a handicapped child, that agency would be responsible for insuring that an individualized education program is developed for the child.

Reg. 300.342 When individualized education programs must be in effect.

(a) On October 1, 1977, and at the beginning of each school year thereafter, each public agency shall have in effect an individualized education program for every handicapped child who is receiving special education from that agency.

(b) An individualized education program must:

(1) Be in effect before special education and related services are provided to a child; and

(2) Be implemented as soon as possible following the meetings under Reg. 300.343.

(20 U.S.C. 1412(2)(B), (4), (6); 1414(a)(5); Publ. L. 94-142, Sec. 8(c) (1975))

Comment. Under paragraph (b)(2), it is expected that a handicapped child's individualized education program (IEP) will be implemented immediately following the meetings under Reg. 300.343. An exception to this would be (1) when the meetings occur during the summer or a vacation period, or (2) where there are circumstances which require a short delay (e.g., working out transportation arrangements). However, there can be no undue delay in providing special education and related services to the child.

Reg. 300.343 Meetings.

(a) *General.* Each public agency is responsible for initiating and conducting meetings for the purpose of developing, reviewing, and revising a handicapped child's individualized education program.

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(b) *Handicapped children currently served.* If the public agency has determined that a handicapped child will receive special education during school year 1977-1978, a meeting must be held early enough to insure that an individualized education program is developed by October 1, 1977.

(c) *Other handicapped children.* For a handicapped child who is not included under paragraph (b) of this section, a meeting must be held within thirty calendar days of a determination that the child needs special education and related services.

(d) *Review.* Each public agency shall initiate and conduct meetings to periodically review each child's individualized education program and if appropriate revise its provisions. A meeting must be held for this purpose at least once a year.

(20 U.S.C. 1412(2)(B), (4), (6); 1414(a)(5))

Comment. The dates on which agencies must have individualized education programs (IEPs) in effect are specified in Reg. 300.342 (October 1, 1977, and the beginning of each school year thereafter). However, except for new handicapped children (i.e., those evaluated and determined to need special education after October 1, 1977), the timing of meetings to develop, review, and revise IEPs is left to the discretion of each agency.

In order to have IEPs in effect by the dates in Reg. 300.342, agencies could hold meetings at the end of the school year or during the summer preceding those dates. In meeting the October 1, 1977 timeline, meetings could be conducted up through the October 1 date. Thereafter, meetings may be held any time throughout the year, as long as IEPs are in effect at the beginning of each school year.

The statute requires agencies to hold a meeting at least once each year in order to review, and if appropriate revise, each child's IEP. The timing of those meetings could be on the anniversary date of the last IEP meeting on the child, but this is left to the discretion of the agency.

Reg. 300.344 Participants in meetings.

(a) *General.* The public agency shall insure that each meeting includes the following participants:

(1) A representative of the public agency, other than the child's teacher, who is qualified to provide, or supervise the provision of, special education.

(2) The child's teacher.

(3) One or both of the child's parents, subject to Reg. 300.345.

(4) The child, where appropriate.

(5) Other individuals at the discretion of the parent or agency.

(b) *Evaluation personnel.* For a handicapped child who has been evaluated for the first time, the public agency shall insure:

(1) That a member of the evaluation team participates in the meeting; or

(2) That the representative of the public agency, the child's teacher, or some other person is present at the meeting, who is knowledgeable about the evaluation procedures used with the child and is familiar with the results of the evaluation.

(20 U.S.C. 1401(19); 1412(2)(B), (4), (6); 1414(a)(5))

Comment. 1. In deciding which teacher will participate in meetings on a child's individualized education program, the agency may wish to consider the following possibilities:

(a) For a handicapped child who is receiving special education, the "teacher" could be the child's special education teacher. If the child's handicap is a speech impairment, the "teacher" could be the speech-language pathologist.

(b) For a handicapped child who is being considered for placement in special education, the "teacher" could be the child's regular teacher, or a teacher qualified to provide education in the type of program in which the child may be placed, or both.

(c) If the child is not in school or has more than one teacher, the agency may designate which teacher will participate in the meeting.

2. Either the teacher or the agency representative should be qualified in the area of the child's suspected disability.

3. For a child whose primary handicap is a speech impairment, the evaluation personnel participating under paragraph (b)(1) of this section would normally be the speech-language pathologist.

Reg. 300.345 Parent participation.

(a) Each public agency shall take steps to insure that one or both of the parents of the handicapped child are present at each meeting or are afforded the opportunity to participate, including:

(1) Notifying parents of the meeting early enough to insure that they will have an opportunity to attend; and

(2) Scheduling the meeting at a mutually agreed on time and place.

(b) The notice under paragraph (a)(1) of this section must indicate the purpose, time, and location of the meeting, and who will be in attendance.

(c) If neither parent can attend, the public agency shall use other methods to insure parent participation, including individual or conference telephone calls.

(d) A meeting may be conducted without a parent in attendance if the public agency is unable to convince the parents that they should attend. In this case the public agency

ust have a record of its attempts to arrange a mutually greed on time and place such as:

(1) Detailed records of telephone calls made or attempted and the results of those calls.

(2) Copies of correspondence sent to the parents and any responses received, and

(3) Detailed records of visits made to the parent's home or place of employment and the results of those visits.

(e) The public agency shall take whatever action is necessary to insure that the parent understands the proceedings at a meeting, including arranging for an interpreter for parents who are deaf or whose native language is other than English.

(f) The public agency shall give the parent, on request, a copy of the individualized education program.

(20 U.S.C. 1401(19); 1412(2)(B), (4), (6); 1414(a)(5))

Comment. The notice in paragraph (a) could also inform parents that they may bring other people to the meeting. As indicated in paragraph (c), the procedure used to notify parents (whether oral or written or both) is left to the discretion of the agency, but the agency must keep a record of its efforts to contact parents.

Reg. 300.346 Content of individualized education program.

The individualized education program for each child must include:

(a) A statement of the child's present levels of educational performance;

(b) A statement of annual goals, including short term instructional objectives;

(c) A statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(d) The projected dates for initiation of services and the anticipated duration of the services; and

(e) Appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short term instructional objectives are being achieved.

(20 U.S.C. 1401(19); 1412 (2)(B), (4), (6); 1414(a)(5); Senate Report No. 94-168, p. 11 (1975))

Reg. 300.347 Private school placements.

(a) *Developing individualized education programs.* (1) Before a public agency places a handicapped child in, or refers a child to, a private school or facility, the agency shall initiate and conduct a meeting to develop an individualized education program for the child in accordance with Reg. 300.343.

(2) The agency shall insure that a representative of the private school facility attends the meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school or facility, including individual or conference telephone calls.

(3) The public agency shall also develop an individualized education program for each handicapped child who was placed in a private school or facility by the agency before the effective date of these regulations.

(b) *Reviewing and revising individualized education programs.* (1) After a handicapped child enters a private school or facility, any meetings to review and revise the child's individualized education program may be initiated and conducted by the private school or facility at the discretion of the public agency.

(2) If the private school or facility initiates and conducts these meetings, the public agency shall insure that the parents and an agency representative:

(i) Are involved in any decision about the child's individualized education program; and

(ii) Agree to any proposed changes in the program before those changes are implemented.

(c) *Responsibility.* Even if a private school or facility implements a child's individualized education program, responsibility for compliance with this part remains with the public agency and the State educational agency.

(20 U.S.C. 1413(a)(4)(B))

Reg. 300.348 Handicapped children in parochial or other private schools.

If a handicapped child is enrolled in a parochial or other private school and receives special education or related services from a public agency, the public agency shall:

(a) Initiate and conduct meetings to develop, review, and revise an individualized education program for the child, in accordance with Reg. 300.343; and

(b) Insure that a representative of the parochial or other private school attends each meeting. If the representative cannot attend, the agency shall use other methods to insure participation by the private school, including individual or conference telephone calls.

(20 U.S.C. 1413(a)(4)(A))

Reg. 300.349 Individualized education program—accountability.

Each public agency must provide special education and related services to a handicapped child in accordance with an individualized education program. However, Part B of the

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Act does not require that any agency, teacher, or other person be held accountable if a child does not achieve the growth projected in the annual goals and objectives.

(20 U.S.C. 1412(2)(B); 1414(a)(5), (6); Cong. Rec. at H7152 (daily ed., July 21, 1975))

Comment. This section is intended to relieve concerns that the individualized education program constitutes a guarantee by the public agency and the teacher that a child will progress at a specified rate. However, this section does not relieve agencies and teachers from making good faith efforts to assist the child in achieving the objectives and goals listed in the individualized education program. Further, the section does not limit a parent's right to complain and ask for revisions of the child's program, or to invoke due process procedures, if the parent feels that these efforts are not being made.

DIRECT SERVICE BY THE STATE EDUCATIONAL AGENCY

Reg. 300.360 Use of local educational agency allocation for direct services.

(a) A State educational agency may not distribute funds to a local educational agency, and shall use those funds to insure the provision of a free appropriate public education to handicapped children residing in the area served by the local educational agency, if the local educational agency, in any fiscal year:

(1) Is entitled to less than $7,500 for that fiscal year (beginning with fiscal year 1979);

(2) Does not submit an application that meets the requirements of Regs. 300.220-300.240;

(3) Is unable or unwilling to establish and maintain programs of free appropriate public education;

(4) Is unable or unwilling to be consolidated with other local educational agencies in order to establish and maintain those programs; or

(5) Has one or more handicapped children who can best be served by a regional or State center designed to meet the needs of those children.

(b) In meeting the requirements of paragraph (a) of this section, the State educational agency may provide special education and related services directly, by contract, or through other arrangements.

(c) The excess cost requirements under Regs. 300.182-300.186 do not apply to the State educational agency.

(20 U.S.C. 1411(c)(4); 1413(b); 1414(d))

Comment. Section 300.360 is a combination of three provisions in the statute (Sections 611(c)(4), 613(b), and 614(d)). This section focuses mainly on the State's administration and use of local entitlements under Part B.

The State educational agency, as a recipient of Part B funds is responsible for insuring that all public agencies in the State comply with the provisions of the Act, regardless of whether they receive Part B funds. If a local educational agency elects not to apply for its Part B entitlement, the State would be required to use those funds to insure that a free appropriate public education (FAPE) is made available to children residing in the area served by that local agency. However, if the local entitlement is not sufficient for this purpose, additional State or local funds would have to be expended in order to insure that "FAPE" and the other requirements of the Act are met.

Moreover, if the local educational agency is the recipient of any other Federal funds, it would have to be in compliance with Subpart D of the regulations for section 504 of the Rehabilitation Act of 1973 (45 CFR Part 84). It should be noted that the term "FAPE" has different meanings under Part B and section 504. For example, under Part B, "FAPE" is a statutory term which requires special education and related services to be provided in accordance with an individualized education program (IEP). However, under section 504, each recipient must provide an education which includes services that are "designed to meet individual educational needs of handicapped persons as adequately as the needs of nonhandicapped persons are met * * *" Those regulations state that implementation of an IEP, in accordance with Part B, is one means of meeting the "FAPE" requirement.

Reg. 300.361 Nature and location of services.

The State educational agency may provide special education and related services under Reg. 300.360(a) in the manner and at the location it considers appropriate. However, the manner in which the education and services are provided must be consistent with the requirements of this part (including the least restrictive environment provision in Regs. 300.550-300.556 of Subpart E).

(20 U.S.C. 1414(d))

Reg. 300.370 Use of State educational agency allocation for direct and support services.

(a) The State shall use the portion of its allocation it does not use for administration to provide support services and direct services in accordance with the priority requirements under Regs. 300.320-300.324.

(b) For the purposes of paragraph (a) of this section:

(1) "Direct services" means services provided to a handicapped child by the State directly, by contract, or through other arrangements.

(2) "Support services" includes implementing the comprehensive system of personnel development under Regs. 300.380-300.388, recruitment and training of hearing officers and surrogate parents, and public information and parent training activities relating to a free appropriate public education for handicapped children.

(20 U.S.C. 1411(b)(2), (c)(2))

Reg. 300.371 State matching.

Beginning with the period July 1, 1978-June 30, 1979, and for each following year, the funds that a State uses for direct and support services under Reg. 300.370 must be matched on a program basis by the State from funds other than Federal funds. This requirement does not apply to funds that the State uses under Reg. 300.360.

(20 U.S.C. 1411(c)(2)(B), (c)(4)(B))

Comment. The requirement in Reg. 300.371 would be satisfied if the State can document that the amount of State funds expended for each major program area (e.g., the comprehensive system of personnel development) is at least equal to the expenditure of Federal funds in that program area.

Reg. 300.372 Applicability of nonsupplanting requirement.

Beginning with funds appropriated for Fiscal Year 1979 and for each following Fiscal Year, the requirement in section 613(a)(9) of the Act, which prohibits supplanting with Federal funds, does not apply to funds that the State uses from its allocation under Reg. 300.706(a) of Subpart G for administration, direct services, or support services.

(20 U.S.C. 1411(c)(3))

COMPREHENSIVE SYSTEM OF PERSONNEL DEVELOPMENT

Reg. 300.380 Scope of system.

Each annual program plan must include a description of programs and procedures for the development and implementation of a comprehensive system of personnel development which includes:

(a) The inservice training of general and special educational instructional, related services, and support personnel;

(b) Procedures to insure that all personnel necessary to carry out the purposes of the Act are qualified (as defined in Reg. 300.12 of Subpart A) and that activities sufficient to carry out this personnel development plan are scheduled; and

(c) Effective procedures for acquiring and disseminating to teachers and administrators of programs for handicapped children significant information derived from educational research, demonstration, and similar projects, and for adopting, where appropriate, promising educational practices and materials developed through those projects.

(20 U.S.C. 1413(a)(3))

Reg. 300.381 Participation of other agencies and institutions.

(a) The State educational agency must insure that all public and private institutions of higher education, and other agencies and organizations (including representatives of handicapped, parent, and other advocacy organizations) in the state which have an interest in the preparation of personnel for the education of handicapped children, have an opportunity to participate fully in the development, review, and annual updating of the comprehensive system of personnel development.

(b) The annual program plan must describe the nature and extent of participation under paragraph (a) of this section and must describe responsibilities of the State educational agency, local educational agencies, public and private institutions of higher education, and other agencies:

(1) With respect to the comprehensive system as a whole, and

(2) With respect to the personnel development plan under Reg. 300.383.

(20 U.S.C. 1412(7)(A); 1413(a)(3))

Reg. 300.382 Inservice training.

(a) As used in this section, "inservice training" means any training other than that received by an individual in a full-time program which leads to a degree.

(b) Each annual program plan must provide that the State educational agency:

(1) Conducts an annual needs assessment to determine if a sufficient number of qualified personnel are available in the State; and

(2) Initiates inservice personnel development programs based on the assessed needs of Statewide significance related to the implementation of the Act.

(c) Each annual program plan must include the results of the needs assessment under paragraph (b)(1) of this section, broken out by need for new personnel and need for retrained personnel.

(d) The State educational agency may enter into contracts with institutions of higher education, local educational agencies or other agencies, institutions, or organizations (which may include parent, handicapped, or other advocacy organizations), to carry out:

(1) Experimental or innovative personnel development programs;

(2) Development or modification of instructional materials; and

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(3) Dissemination of significant information derived from educational research and demonstration projects.

(e) Each annual program plan must provide that the State educational agency insures that ongoing inservice training programs are available to all personnel who are engaged in the education of handicapped children, and that these programs include:

(1) The use of incentives which insure participation by teachers (such as released time, payment for participation, options for academic credit, salary step credit, certification renewal, or updating professional skills);

(2) The involvement of local staff; and

(3) The use of innovative practices which have been found to be effective.

(f) Each annual program plan must:

(1) Describe the process used in determining the inservice training needs of personnel engaged in the education of handicapped children;

(2) Identify the areas in which training is needed (such as individualized education programs, non-discriminatory testing, least restrictive environment, procedural safeguards, and surrogate parents);

(3) Specify the groups requiring training (such as special teachers, regular teachers, administrators, psychologists, speech-language pathologists, audiologists, physical education teachers, therapeutic recreation specialists, physical therapists, occupational therapists, medical personnel, parents, volunteers, hearing officers, and surrogate parents);

(4) Describe the content and nature of training for each area under paragraph (f)(2) of this section;

(5) Describe how the training will be provided in terms of (i) geographical scope (such as Statewide, regional, or local), and (ii) staff training source (such as college and university staffs, State and local educational agency personnel, and non-agency personnel);

(6) Specify: (i) The funding sources to be used, and

(ii) The time frame for providing it; and

(7) Specify procedures for effective evaluation of the extent to which program objectives are met.

(20 U.S.C. 1413(a)(3))

Reg. 300.383 Personnel development plan.

Each annual program plan must: (a) Include a personnel development plan which provides a structure for personnel planning and focuses on preservice and in-service education needs;

(b) Describe the results of the needs assessment under Reg 300.382(b)(1) with respect to identifying needed areas of training, and assigning priorities to those areas; and

(c) Identify the target populations for personnel development, including general education and special education instructional and administrative personnel, support personnel, and other personnel (such as paraprofessionals, parents, surrogate parents, and volunteers).

(20 U.S.C. 1413(a)(3))

Reg. 300.384 Dissemination.

(a) Each annual program plan must include a description of the State's procedures for acquiring, reviewing, and disseminating to general and special educational instructional and support personnel, administrators of programs for handicapped children, and other interested agencies and organizations (including parent, handicapped, and other advocacy organizations) significant information and promising practices derived from educational research, demonstration, and other projects.

(b) Dissemination includes:

(1) Making those personnel, administrators, agencies, and organizations aware of the information and practices;

(2) Training designed to enable the establishment of innovative programs and practices targeted on identified local needs; and

(3) Use of instructional materials and other media for personnel development and instructional programming.

(20 U.S.C. 1413(a)(3))

Reg. 300.385 Adoption of educational practices.

(a) Each annual program must provide for a statewide system designed to adopt, where appropriate, promising educational practices and materials proven effective through research and demonstration.

(b) Each annual program plan must provide for thorough reassessment of educational practices used in the State.

(c) Each annual program plan must provide for the identification of State, local, and regional resources (human and material) which will assist in meeting the State's personnel preparation needs.

(20 U.S.C. 1413(a)(3))

Reg. 300.387 Technical assistance to local educational agencies.

Each annual program plan must include a description of technical assistance that the State educational agency gives to local educational agencies in their implementation of the State's comprehensive system of personnel development.

(20 U.S.C. 1413(a)(3))

Subpart D—Private Schools

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS PLACED OR REFERRED BY PUBLIC AGENCIES

Reg. 300.400 Applicability of Regs. 300.401-300.403.

Regs. 300.401-300.403 apply only to handicapped children who are or have been placed in or referred to a private school or facility by a public agency as a means of providing special education and related services.

(20 U.S.C. 1413(a)(4)(B))

Reg. 300.401 Responsibility of State educational agency.

Each State educational agency shall insure that a handicapped child who is placed in or referred to a private school or facility by a public agency:

(a) Is provided special education and related services:
(1) In conformance with an individualized educational program which meets the requirements under Regs. 300.340-300.349 of Subpart C;
(2) At no cost to the parents; and
(3) At a school or facility which meets the standards that apply to State and local educational agencies (including the requirements in this part); and
(b) Has all of the rights of a handicapped child who is served by a public agency.

(20 U.S.C. 1413(a)(4)(B))

Reg. 300.402 Implementation by State educational agency.

In implementing Reg. 300.401, the State educational agency shall:

(a) Monitor compliance through procedures such as written reports, on-site visits, and parent questionnaires;
(b) Disseminate copies of applicable standards to each private school and facility to which a public agency has referred or placed a handicapped child; and
(c) Provide an opportunity for those private schools and facilities to participate in the development and revision of State standards which apply to them.

(20 U.S.C. 1413(a)(4)(B))

Reg. 121a.403 Placement of children by parents.

(a) If a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public agency is not required by this part to pay for the child's education at the private school or facility. However, the public agency shall make services available to the child as provided under Regs. 300.450-300.460.
(b) Disagreements between a parent and a public agency regarding the availability of a program appropriate for the child, and the question of financial responsibility, are subject to the due process procedures under Regs. 300.500-300.514 of Subpart E.

(20 U.S.C. 1412(2)(B); 1415)

HANDICAPPED CHILDREN IN PRIVATE SCHOOLS NOT PLACED OR REFERRED BY PUBLIC AGENCIES

Reg. 300.450 Definition of "private school handicapped children."

As used in Regs. 300.451-300.452, "private school handicapped children" means handicapped children enrolled in private schools or facilities other than handicapped children covered under Regs. 300.400-300.403.

(20 U.S.C. 1413(a)(4)(A))

[Amended in 45 Fed. Reg. 22531 (April 3, 1980).]

Reg. 300.451 State educational agency responsibility.

The State educational agency shall insure that—
(a) To the extent consistent with their number and location in the State, provision is made for the participation of private school handicapped children in the program assisted or carried out under this part by providing them with special education and related services; and
(b) The other requirements in 34 CFR 76.651-76.663 of EDGAR are met.

(20 U.S.C. 1413(a)(4)(A))

[Amended in 45 Fed. Reg. 22531 (April 3, 1980).]

Reg. 300.452 Local educational agency responsibility.

(a) Each local educational agency shall provide special education and related services designed to meet the needs of private school handicapped children residing in the jurisdiction of the agency.

(20 U.S.C. 1413(a)(4)(A); 1414(a)(6))

[Amended in 45 Fed. Reg. 22531 (April 3, 1980).]

Subpart E—Procedural Safeguards

DUE PROCESS PROCEDURES FOR PARENTS AND CHILDREN

Reg. 300.500 Definitions of "consent," "evaluation," and "personally identifiable."

As used in this part: "Consent" means that: (a) The parent has been fully informed of all information relevant to

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the activity for which consent is sought, in his or her native language, or other mode of communication;

(b) The parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent describes that activity and lists the records (if any) which will be released and to whom; and

(c) The parent understands that the granting of consent is voluntary on the part of the parent and may be revoked at any time.

"Evaluation" means procedures used in accordance with Regs. 300.530-300.534 to determine whether a child is handicapped and the nature and extent of the special education and related services that the child needs. The term means procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school, grade, or class.

"Personally identifiable" means that information includes:

(a) The name of the child, the child's parent, or other family member;

(b) The address of the child;

(c) A personal identifier, such as the child's social security number or student number; or

(d) A list of personal characteristics or other information which would make it possible to identify the child with reasonable certainty.

(20 U.S.C. 1415, 1417(c))

Reg. 300.501 General responsibility of public agencies.

Each State educational agency shall insure that each public agency establishes and implements procedural safeguards which meet the requirements of Regs. 300.500-300.514.

(20 U.S.C. 1415(a))

Reg. 300.502 Opportunity to examine records.

The parents of a handicapped child shall be afforded, in accordance with the procedures in Regs. 300.562-300.569 an opportunity to inspect and review all education records with respect to:

(a) The identification, evaluation, and educational placement of the child, and

(b) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(A))

Reg. 300.503 Independent educational evaluation.

(a) *General*. (1) The parents of a handicapped child have the right under this part to obtain an independent educational evaluation of the child, subject to paragraphs (b) through (e) of this section.

(2) Each public agency shall provide to parents, on request, information about where an independent educational evaluation may be obtained.

(3) For the purposes of this part:

(i) "Independent educational evaluation" means an evaluation conducted by a qualified examiner who is not employed by the public agency responsible for the education of the child in question.

(ii) "Public expense" means that the public agency either pays for the full cost of the evaluation or insures that the evaluation is otherwise provided at no cost to the parent, consistent with Reg. 300.301 of Subpart C.

(b) *Parent right to evaluation at public expense*. A parent has the right to an independent educational evaluation at public expense if the parent disagrees with an evaluation obtained by the public agency. However, the public agency may initiate a hearing under Reg. 300.506 of this subpart to show that its evaluation is appropriate. If the final decision is that the evaluation is appropriate, the parent still has the right to an independent educational evaluation, but not at public expense.

(c) *Parent initiated evaluations*. If the parent obtains an independent educational evaluation at private expense, the results of the evaluation:

(1) Must be considered by the public agency in any decision made with respect to the provision of a free appropriate public education to the child, and

(2) May be presented as evidence at a hearing under this subpart regarding that child.

(d) *Requests for evaluations by hearing officers*. If a hearing officer requests an independent educational evaluation as part of a hearing, the cost of the evaluation must be at public expense.

(e) *Agency criteria*. Whenever an independent evaluation is at public expense, the criteria under which the evaluation is obtained, including the location of the evaluation and the qualifications of the examiner, must be the same as the criteria which the public agency uses when it initiates an evaluation.

(20 U.S.C. 1415(b)(1)(A))

Reg. 300.504 Prior notice; parent consent.

(a) *Notice*. Written notice which meets the requirements under Reg. 300.505 must be given to the parents of a handicapped child a reasonable time before the public agency:

(1) Proposes to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child, or

(2) Refuses to initiate or change the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child.

(b) *Consent.* (1) Parental consent must be obtained before:

(i) Conducting a preplacement evaluation; and

(ii) Initial placement of a handicapped child in a program providing special education and related services.

(2) Except for preplacement evaluation and initial placement, consent may not be required as a condition of any benefit to the parent or child.

(c) *Procedures where parent refuses consent.* (1) Where State law requires parental consent before a handicapped child is evaluated or initially provided special education and related services, State procedures govern the public agency in overriding a parent's refusal to consent.

(2)(i) Where there is no State law requiring consent before a handicapped child is evaluated or initially provided special education and related services, the public agency may use the hearing procedures in Regs. 300.506-300.508 to determine if the child may be evaluated or initially provided special education and related services without parental consent.

(ii) If the hearing officer upholds the agency, the agency may evaluate or initially provide special education and related services to the child without the parent's consent, subject to the parent's rights under Regs. 300.510-300.513.

(20 U.S.C. 1415(b)(1)(C), (D))

Comment. 1. Any changes in a child's special education program, after the initial placement, are not subject to parental consent under Part B, but are subject to the prior notice requirement in paragraph (a) and the individualized education program requirements in Subpart C.

2. Paragraph (c) means that where State law requires parental consent before evaluation or before special education and related services are initially provided and the parent refuses (or otherwise withholds) consent, State procedures, such as obtaining a court order authorizing the public agency to conduct the evaluation or provide the education and related services, must be followed.

If, however, there is no legal requirement for consent outside of these regulations, the public agency may use the due process procedures under this subpart to obtain a decision to allow the evaluation or services without parental consent. The agency must notify the parent of its actions, and the parent has appeal rights as well as rights at the hearing itself.

Reg. 300.505 Content of notice.

(a) The notice under Reg. 300.504 must include:

(1) A full explanation of all of the procedural safeguards available to the parents under Subpart E;

(2) A description of the action proposed or refused by the agency, an explanation of why the agency proposes or refuses to take the action, and a description of any options the agency considered and the reasons why those options were rejected;

(3) A description of each evaluation procedure, test, record, or report the agency uses as a basis for the proposal or refusal; and

(4) A description of any other factors which are relevant to the agency's proposal or refusal.

(b) The notice must be:

(1) Written in language understandable to the general public, and

(2) Provided in the native language of the parent or other mode of communication used by the parent, unless it is clearly not feasible to do so.

(c) If the native language or other mode of communication of the parent is not a written language, the State or local educational agency shall take steps to insure:

(1) That the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) That the parent understands the content of the notice, and

(3) That there is written evidence that the requirements in paragraph (c) (1) and (2) of this section have been met.

(20 U.S.C. 1415(b)(1)(D))

Reg. 300.506 Impartial due process hearing.

(a) A parent or a public educational agency may initiate a hearing on any of the matters described in Reg. 300.504(a)(1) and (2).

(b) The hearing must be conducted by the State educational agency or the public agency directly responsible for the education of the child, as determined under State statute, State regulation, or a written policy of the State educational agency.

(c) The public agency shall inform the parent of any free or low-cost legal and other relevant services available in the area if:

(1) The parent requests the information; or

(2) The parent or the agency initiates a hearing under this section.

(20 U.S.C. 1416(b)(2))

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Comment. Many States have pointed to the success of using mediation as an intervening step prior to conducting a formal due process hearing. Although the process of mediation is not required by the statute or these regulations, an agency may wish to suggest mediation in disputes concerning the identification, evaluation, and educational placement of handicapped children, and the provision of a free appropriate public education to those children. Mediations have been conducted by members of State educational agencies or local educational agency personnel who were not previously involved in the particular case. In many cases, mediation leads to resolution of differences between parents and agencies without the development of an adversarial relationship and with minimal emotional stress. However, mediation may not be used to deny or delay a parent's rights under this subpart.

Reg. 300.507 Impartial hearing officer.

(a) A hearing may not be conducted:

(1) By a person who is an employee of a public agency which is involved in the education or care of the child, or

(2) By any person having a personal or professional interest which would conflict with his or her objectivity in the hearing.

(b) A person who otherwise qualifies to conduct a hearing under paragraph (a) of this section is not an employee of the agency solely because he or she is paid by the agency to serve as a hearing officer.

(c) Each public agency shall keep a list of the persons who serve as hearing officers. The list must include a statement of the qualifications of each of those persons.

(20 U.S.C. 1414(b)(2))

Reg. 300.508 Hearing rights.

(a) Any party to a hearing has the right to:

(1) Be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of handicapped children;

(2) Present evidence and confront, cross-examine, and compel the attendance of witnesses;

(3) Prohibit the introduction of any evidence at the hearing that has not been disclosed to that party at least five days before the hearing.

(4) Obtain a written or electronic verbatim record of the hearing;

(5) Obtain written findings of fact and decisions. (The public agency shall transmit those findings and decisions, after deleting any personally identifiable information, to the State advisory panel established under Subpart F).

(b) Parents involved in hearings must be given the right to:

(1) Have the child who is the subject of the hearing present; and

(2) Open the hearing to the public.

(20 U.S.C. 1415(d))

Reg. 300.509 Hearing decision; appeal.

A decision made in a hearing conducted under this subpart is final, unless a party to the hearing appeals the decision under Reg. 300.510 or Reg. 300.511.

Reg. 300.510 Administrative appeal; impartial review.

(a) If the hearing is conducted by a public agency other than the State educational agency, any party aggrieved by the findings and decision in the hearing may appeal to the State educational agency.

(b) If there is an appeal, the State educational agency shall conduct an impartial review of the hearing. The official conducting the review shall:

(1) Examine the entire hearing record;

(2) Insure that the procedures at the hearing were consistent with the requirements of due process;

(3) Seek additional evidence if necessary. If a hearing is held to receive additional evidence, the rights in Reg. 300.508 apply;

(4) Afford the parties an opportunity for oral or written argument, or both, at the discretion of the reviewing official;

(5) Make an independent decision on completion of the review; and

(6) Give a copy of written findings and the decision to the parties.

(c) The decision made by the reviewing official is final, unless a party brings a civil action under Reg. 300.512.

(20 U.S.C. 1415(c), (d); H.Rep. No. 94-664, at p. 49 (1975))

Comment. 1. The State educational agency may conduct its review either directly or through another State agency acting on its behalf. However, the State educational agency remains responsible for the final decision on review.

2. All parties have the right to continue to be represented by counsel at the State administrative review level, whether or not the reviewing official determines that a further hearing is necessary. If the reviewing official decides to hold a hearing to receive additional evidence, the other rights in Reg. 300.508, relating to hearings, also apply.

Reg. 300.511 Civil action.

Any party aggrieved by the findings and decision made in a hearing who does not have the right to appeal under Reg. 300.510 of this subpart, and any party aggrieved by the decision of a reviewing officer under Reg. 300.510 has the right to bring a civil action under Section 615(e)(2) of the Act.

(20 U.S.C. 1415)

Reg. 300.512 Timeliness and convenience of hearings and reviews.

(a) The public agency shall insure that not later than 45 days after the receipt of a request for a hearing:

(1) A final decision is reached in the hearing; and

(2) A copy of the decision is mailed to each of the parties.

(b) The State educational agency shall insure that not later than 30 days after the receipt of a request for a review:

(1) A final decision is reached in the review; and

(2) A copy of the decision is mailed to each of the parties.

(c) A hearing or reviewing officer may grant specific extensions of time beyond the periods set out in paragraphs (a) and (b) of this section at the request of either party.

(d) Each hearing and each review involving oral arguments must be conducted at a time and place which is reasonably convenient to the parents and child involved.

(20 U.S.C. 1415)

Reg. 300.513 Child's status during proceedings.

(a) During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of the child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

(b) If the complaint involves an application for initial admission to public school, the child, with the consent of the parents, must be placed in the public school program until the completion of all the proceedings.

(20 U.S.C. 1415(e)(3))

Comment. Reg. 300.513 does not permit a child's placement to be changed during a complaint proceeding, unless the parents and agency agree otherwise. While the placement may not be changed, this does not preclude the agency from using its normal procedures for dealing with children who are endangering themselves or others.

Reg. 300.514 Surrogate parents.

(a) *General*. Each public agency shall insure that the rights of a child are protected when:

(1) No parent (as defined in Reg. 300.10) can be identified;

(2) The public agency, after reasonable efforts, cannot discover the whereabouts of a parent; or

(3) The child is a ward of the State under the laws of that State.

(b) *Duty of public agency*. The duty of a public agency under paragraph (a) of this section includes the assignment of an individual to act as a surrogate for the parents. This must include a method (1) for determining whether a child needs a surrogate parent, and (2) for assigning a surrogate parent to the child.

(c) *Criteria for selection of surrogates*. (1) The public agency may select a surrogate parent in any way permitted under State law.

(2) Public agencies shall insure that a person selected as a surrogate:

(i) Has no interest that conflicts with the interest of the child he or she represents; and

(ii) Has knowledge and skills, that insure adequate representation of the child.

(d) *Non-employee requirement; compensation*. (1) A person assigned as a surrogate may not be an employee of a public agency which is involved in the education or care of the child.

(2) A person who otherwise qualifies to be a surrogate parent under paragraph (c) and (d)(1) of this section, is not an employee of the agency solely because he or she is paid by the agency to serve as surrogate parent.

(e) *Responsibilities*. The surrogate parent may represent the child in all matters relating to:

(1) The identification, evaluation, and educational placement of the child, and

(2) The provision of a free appropriate public education to the child.

(20 U.S.C. 1415(b)(1)(B))

PROTECTION IN EVALUATION PROCEDURES

Reg. 300.530 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of Regs. 300.530-300.534.

(b) Testing and evaluation materials and procedures used for the purposes of evaluation and placement of handicapped children must be selected and administered so as not to be racially or culturally discriminatory.

(20 U.S.C. 1412(5)(C))

Reg. 300.531 Preplacement evaluation.

Before any action is taken with respect to the initial placement of a handicapped child in a special educational program, a full and individual evaluation of the child's educational needs must be conducted in accordance with the requirements of Reg. 300.532.

(20 U.S.C. 1412(5)(C))

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Reg. 300.532 Evaluation procedures.

State and local educational agencies shall insure, at a minimum, that:

(a) Tests and other evaluation materials:

(1) Are provided and administered in the child's native language or other mode of communication, unless it is clearly not feasible to do so;

(2) Have been validated for the specific purpose for which they are used; and

(3) Are administered by trained personnel in conformance with the instructions provided by their producers;

(b) Tests and other evaluation materials include those tailored to assess specific areas of educational need and not merely those which are designed to provide a single general intelligence quotient;

(c) Tests are selected and administered so as best to ensure that when a test is administered to a child with impaired sensory, manual, or speaking skills, the test results accurately reflect the child's aptitude or achievement level or whatever other factors the test purports to measure, rather than reflecting the child's impaired sensory, manual, or speaking skills (except where those skills are the factors which the test purports to measure);

(d) No single procedure is used as the sole criterion for determining an appropriate educational program for a child; and

(e) The evaluation is made by a multidisciplinary team or group of persons, including at least one teacher or other specialist with knowledge in the area of suspected disability.

(f) The child is assessed in all areas related to the suspected disability, including, where appropriate, health, vision, hearing, social and emotional status, general intelligence, academic performance, communicative status, and motor abilities.

(20 U.S.C. 1412(5)(C))

Comment. Children who have a speech impairment as their primary handicap may not need a complete battery of assessments (*e.g.*, psychological, physical, or adaptive behavior). However, a qualified speech-language pathologist would (1) evaluate each speech impaired child using procedures that are appropriate for the diagnosis and appraisal of speech and language disorders, and (2) where necessary, make referrals for additional assessments needed to make an appropriate placement decision.

Reg. 300.533 Placement procedures.

(a) In interpreting evaluation data and in making placement decisions, each public agency shall:

(1) Draw upon information from a variety of sources, including aptitude and achievement tests, teacher recommendations, physical condition, social or cultural background, and adaptive behavior;

(2) Insure that information obtained from all of these sources is documented and carefully considered;

(3) Insure that the placement decision is made by a group of persons, including persons knowledgeable about the child, the meaning of the valuation data, and the placement options; and

(4) Insure that the placement decision is made in conformity with the least restrictive environment rules in Regs. 300.550-300.554.

(b) If a determination is made that a child is handicapped and needs special education and related services, an individualized education program must be developed for the child in accordance with Regs. 300.340-300.349 of Subpart C.

(20 U.S.C. 1412(5)(C); 1414(a)(5))

Comment. Paragraph (a)(1) includes a list of examples of sources that may be used by a public agency in making placement decisions. The agency would not have to use all the sources in every instance. The point of the requirement is to insure that more than one source is used in interpreting evaluation data and in making placement decisions. For example, while all of the named sources would have to be used for a child whose suspected disability is mental retardation, they would not be necessary for certain other handicapped children, such as a child who has a severe articulation disorder as his primary handicap. For such a child, the speech-language pathologist, in complying with the multisource requirement, might use (1) a standardized test of articulation, and (2) observation of the child's articulation behavior in conversational speech.

Reg. 300.534 Reevaluation.

Each State and local educational agency shall insure:

(a) That each handicapped child's individualized education program is reviewed in accordance with Regs. 300.340-300.349 of Subpart C, and

(b) That an evaluation of the child, based on procedures which meet the requirements under Reg. 300.532, is conducted every three years or more frequently if conditions warrant or if the child's parent or teacher requests an evaluation.

(20 U.S.C. 1412(5)(c))

ADDITIONAL PROCEDURES FOR EVALUATING SPECIFIC LEARNING DISABILITIES

Reg. 300.540 Additional team members.

In evaluating a child suspected of having a specific learning disability, in addition to the requirements of

Reg. 300.532, each public agency shall include on the multidisciplinary evaluation team:

(a)(1) The child's regular teacher; or

(2) If the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age; or

(3) For a child of less than school age, an individual qualified by the State educational agency to teach a child of his or her age; and

(b) At least one person qualified to conduct individual diagnostic examination of children, such as a school psychologist, speech-language pathologist, or remedial reading teacher.

(20 U.S.C. 1411 note.)

[Adopted in 43 Fed. Reg. 65083 (Dec. 29, 1977).]

Reg. 300.541 Criteria for determining the existence of a specific learning disability.

(a) A team may determine that a child has a specific learning disability if:

(1) The child does not achieve commensurate with his or her age and ability levels in one or more of the areas listed in paragraph (a)(2) of this section, when provided with learning experiences appropriate for the child's age and ability levels; and

(2) The team finds that a child has a severe discrepancy between achievement and intellectual ability in one or more of the following areas:

(i) Oral expression;

(ii) Listening comprehension;

(iii) Written expression;

(iv) Basic reading skill;

(v) Reading comprehension;

(vi) Mathematics calculation; or

(vii) Mathematic reasoning.

(b) The team may not identify a child as having a specific learning disability if the severe discrepancy between ability and achievement is primarily the result of:

(1) A visual, hearing, or motor handicap;

(2) Mental retardation;

(3) Emotional disturbance; or

(4) Environmental, cultural or economic disadvantage.

(20 U.S.C. 1411 note.)

[Adopted in 43 Fed. Reg. 65083 (Dec. 29, 1977).]

Reg. 300.542 Observation.

(a) At least one team member other than the child's regular teacher shall observe the child's academic performance in the regular classroom setting.

(b) In the case of a child of less than school age or out of school, a team member shall observe the child in an environment appropriate for a child of that age.

(20 U.S.C. 1411 note.)

[Adopted in 43 Fed. Reg. 65083 (Dec. 29, 1977).]

Reg. 300.543 Written report.

(a) The team shall prepare a written report of the results of the evaluation.

(b) The report must include a statement of:

(1) Whether the child has a specific learning disability;

(2) The basis for making the determination;

(3) The relevant behavior noted during the observation of the child;

(4) The relationship of that behavior to the child's academic functioning;

(5) The educationally relevant medical findings, if any;

(6) Whether there is a severe discrepancy between achievement and ability which is not correctable without special education and related services; and

(7) The determination of the team concerning the effects of environmental, cultural, or economic disadvantage.

(c) Each team member shall certify in writing whether the report reflects his or her conclusion. If it does not reflect his or her conclusion, the team member must submit a separate statement presenting his or her conclusions.

(20 U.S.C. 1411 note.)

[Adopted in 43 Fed. Reg. 65083 (Dec. 29, 1977).]

LEAST RESTRICTIVE ENVIRONMENT

Reg. 300.550 General.

(a) Each State educational agency shall insure that each public agency establishes and implements procedures which meet the requirements of Regs. 300.550-300.556.

(b) Each public agency shall insure:

(1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped, and

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(2) That special classes, separate schooling or other removal of handicapped children from the regular educational environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

(20 U.S.C. 1412(5)(B); 1414(a)(1)(C)(iv))

Reg. 300.551 Continuum of alternative placements.

(a) Each public agency shall insure that a continuum of alternative placements is available to meet the needs of handicapped children for special education and related services.

(b) The continuum required under paragraph (a) of this section must:

(1) Include the alternative placements listed in the definition of special education under Reg. 300.13 of Subpart A (instruction in regular classes, special classes, special schools, home instruction, and instruction in hospitals and institutions), and

(2) Make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement.

(20 U.S.C. 1412(5)(B))

Reg. 300.552 Placements.

Each public agency shall insure that:

(a) Each handicapped child's educational placement:

(1) Is determined at least annually,

(2) Is based on his or her individualized education program, and

(3) Is as close as possible to the child's home;

(b) The various alternative placements included under Reg. 300.551 are available to the extent necessary to implement the individualized education program for each handicapped child;

(c) Unless a handicapped child's individualized education program requires some other arrangement, the child is educated in the school which he or she would attend if not handicapped; and

(d) In selecting the least restrictive environment, consideration is given to any potential harmful effect on the child or on the quality of services which he or she needs.

(20 U.S.C. 1412(5)(B))

Comment. Reg. 300.552 includes some of the main factors which must be considered in determining the extent to which a handicapped child can be educated with children who are not handicapped. The overriding rule in this section is that placement decisions must be made on an individual basis. The section also requires each agency to have various alternative placements available in order to insure that each handicapped child receives an education which is appropriate to his or her individual needs.

The analysis of the regulations for Section 504 of the Rehabilitation Act of 1973 (34 CFR Part 104—Appendix, Paragraph 24) includes several points regarding educational placements of handicapped children which are pertinent to this section:

1. With respect to determining proper placements, the analysis states: "* * * it should be stressed that, where a handicapped child is so disruptive in a regular classroom that the education of other students is significantly impaired, the needs of the handicapped child cannot be met in that environment. Therefore regular placement would not be appropriate to his or her need * * *."

2. With respect to placing a handicapped child in an alternate setting, the analysis states that among the factors to be considered in placing a child is the need to place the child as close to home as possible. Recipients are required to take this factor into account in making placement decisions. The parents' right to challenge the placement of their child extends not only to placement in special classes or separate schools, but also to placement in a distant school, particularly in a residential program. An equally appropriate education program may exist closer to home; and this issue may be raised by the parent under the due process provisions of this subject.

Reg. 300.553 Non-academic settings.

In providing or arranging for the provision of non-academic and extra-curricular services and activities, including meals, recess periods, and the services and activities set forth in Reg. 300.306 of Subpart C, each public agency shall insure that each handicapped child participates with non-handicapped children in those services and activities to the maximum extent appropriate to the needs of that child.

(20 U.S.C. 1412(5)(B))

Comment. Reg. 300.553 is taken from a new requirement in the final regulations for Section 504 of the Rehabilitation Act of 1973. With respect to this requirement, the analysis of the Section 504 Regulations includes the following statement: "[A new paragraph] specifies that handicapped children must also be provided non-academic services in as integrated a setting as possible. This requirement is especially important for children whose educational needs necessitate their being solely with other handicapped children during most of each day. To the maximum extent appropriate, children in residential settings are also to be provided opportunities for participation with other children." (45 CFR Part 84—Appendix, Paragraph 24.)

Reg. 300.554 Children in public or private institutions.

Each State educational agency shall make arrangements with public and private institutions (such as a memorandum

of agreement or special implementation procedures) as may be necessary to insure that Reg. 300.550 is effectively implemented.

(20 U.S.C. 1412(5)(B))

Comment. Under Section 612(5)(B) of the statute, the requirement to educate handicapped children with nonhandicapped children also applies to children in public and private institutions or other care facilities. Each State educational agency must insure that each applicable agency and institution in the State implements this requirement. Regardless of other reasons for institutional placement, no child in an institution who is capable of education in a regular public school setting may be denied access to an education in that setting.

Reg. 300.555 Technical assistance and training activities.

Each State educational agency shall carry out activities to insure that teachers and administrators in all public agencies:

(a) Are fully informed about their responsibilities for implementing Reg. 300.550, and

(b) Are provided with technical assistance and training necessary to assist them in this effort.

(20 U.S.C. 1412(5)(B))

Reg. 121.556 Monitoring activities.

(a) The State educational agency shall carry out activities to insure that Reg. 300.550 is implemented by each public agency.

(b) If there is evidence that a public agency makes placements that are inconsistent with Reg. 300.550 of this subpart, the State educational agency:

(1) Shall review the public agency's justification for its actions, and

(2) Shall assist in planning and implementing any necessary corrective action.

(20 U.S.C. 1412(5)(B))

CONFIDENTIALITY OF INFORMATION

Reg. 300.560 Definitions.

As used in this subpart:

"Destruction" means physical destruction or removal of personal identifiers from information so that the information is no longer personally identifiable.

"Education records" means the type of records covered under the definition of "education records" in Part 99 of this title (the regulations implementing the Family Educational Rights and Privacy Act of 1974).

"Participating agency" means any agency or institution which collects, maintains, or uses personally identifiable information, or from which information is obtained, under this part.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.561 Notice to parents.

(a) The State educational agency shall give notice which is adequate to fully inform parents about the requirements under Reg. 300.128 of Subpart B, including:

(1) A description of the extent to which the notice is given in the native languages of the various population groups in the State;

(2) A description of the children on whom personally identifiable information is maintained, the types of information sought, the methods the State intends to use in gathering the information (including the sources from whom information is gathered), and the uses to be made of the information.

(3) A summary of the policies and procedures which participating agencies must follow regarding storage, disclosure to third parties, retention, and destruction of personally identifiable information; and

(4) A description of all of the rights of parents and children regarding this information, including the rights under Section 438 of the General Education Provisions Act and Part 99 of this title (the Family Educational Rights and Privacy Act of 1974, and implementing regulations).

(b) Before any major identification, location, or evaluation activity, the notice must be published or announced in newspapers or other media, or both, with circulation adequate to notify parents throughout the State of the activity.

(20 U.S.C. 14312(2)(D); 1417(c))

Reg. 300.562 Access rights.

(a) Each participating agency shall permit parents to inspect and review any education records relating to their children which are collected, maintained, or used by the agency under this part. The agency shall comply with a request without unnecessary delay and before any meeting regarding an individualized education program or hearing relating to the identification, evaluation, or placement of the child, and in no case more than 45 days after the request has been made.

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(b) The right to inspect and review education records under this section includes:

(1) The right to a response from the participating agency to reasonable requests for explanations and interpretations of the records;

(2) The right to request that the agency provide copies of the records containing the information if failure to provide those copies would effectively prevent the parent from exercising the right to inspect and review the records; and

(3) The right to have a representative of the parent inspect and review the records.

(c) An agency may presume that the parent has authority to inspect and review records relating to his or her child unless the agency has been advised that the parent does not have the authority under applicable State law governing such matters as guardianship, separation, and divorce.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.563 Record of access.

Each participating agency shall keep a record of parties obtaining access to education records collected, maintained, or used under this part (except access by parents and authorized employees of the participating agency), including the name of the party, the date access was given, and the purpose for which the party is authorized to use the records.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.564 Records on more than one child.

If any education record includes information on more than one child, the parents of those children shall have the right to inspect and review only the information relating to their child or to be informed of that specific information.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.565 List of types and locations of information.

Each participating agency shall provide parents on request a list of the types and locations of education records collected, maintained, or used by the agency.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.566 Fees.

(a) A participating education agency may charge a fee for copies of records which are made for parents under this part if the fee does not effectively prevent the parents from exercising their right to inspect and review those records.

(b) A participating agency may not charge a fee to search for or to retrieve information under this part.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.567 Amendment of records at parent's request.

(a) A parent who believes that information in education records collected, maintained, or used under this part is inaccurate or misleading or violates the privacy or other rights of the child, may request the participating agency which maintains the information to amend the information.

(b) The agency shall decide whether to amend the information in accordance with the request within a reasonable period of time of receipt of the request.

(c) If the agency decides to refuse to amend the information in accordance with the request it shall inform the parent of the refusal, and advise the parent of the right to a hearing under Reg. 300.568.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.568 Opportunity for a hearing.

The agency shall, on request, provide an opportunity for a hearing to challenge information in education records to insure that it is not inaccurate, misleading, or otherwise in violation of the privacy or other rights of the child.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.569 Result of hearing.

(a) If, as a result of the hearing, the agency decides that the information is inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall amend the information accordingly and so inform the parent in writing.

(b) If, as a result of the hearing, the agency decides that the information is not inaccurate, misleading, or otherwise in violation of the privacy of other rights of the child, it shall inform the parent of the right to place in the records it maintains on the child a statement commenting on the information or setting forth any reasons for disagreeing with the decision of the agency.

(c) Any explanation placed in the records of the child under this section must:

(1) Be maintained by the agency as part of the records of the child as long as the record or contested portion is maintained by the agency; and

(2) If the records of the child or the contested portion is disclosed by the agency to any party, the explanation must also be disclosed to the party.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.570 Hearing procedures.

A hearing held under Reg. 300.568 of this subpart must be conducted according to the procedures under Reg. 99.92 of this title.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.571 Consent.

(a) Parental consent must be obtained before personally identifiable information is:

(1) Disclosed to anyone other than officials of participating agencies collecting or using the information under this part, subject to paragraph (b) of this section; or

(2) Used for any purpose other than meeting a requirement under this part.

(b) An educational agency or institution subject to Part 99 of this title may not release information from education records to participating agencies without parental consent unless authorized to do so under Part 99 of this title.

(c) The State educational agency shall include policies and procedures in its annual program plan which are used in the event that a parent refuses to provide consent under this section.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.572 Safeguards.

(a) Each participating agency shall protect the confidentiality of personally identifiable information at collection, storage, disclosure, and destruction stages.

(b) One official at each participating agency shall assume responsibility for insuring the confidentiality of any personally identifiable information.

(c) All persons collecting or using personally identifiable information must receive training or instruction regarding the State's policies and procedures under Reg. 300.129 of Subpart B and Part 99 of this title.

(d) Each participating agency shall maintain, for public inspection, a current listing of the names and positions of those employees within the agency who may have access to personally identifiable information.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.573 Destruction of information.

(a) The public agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

(b) The information must be destroyed at the request of the parents. However, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

(20 U.S.C. 1412(2)(D); 1417(c))

Comment. Under Reg. 300.573, the personally identifiable information on a handicapped child may be retained permanently unless the parents request that it be destroyed. Destruction of records is the best protection against improper and unauthorized disclosure. However, the records may be needed for other purposes. In informing parents about their rights under this section, the agency should remind them that the records may be needed by the child or the parents for social security benefits or other purposes. If the parents request that the information be destroyed, the agency may retain the information in paragraph (b).

Reg. 300.574 Children's rights.

The State educational agency shall include policies and procedures in its annual program plan regarding the extent to which children are afforded rights of privacy similar to those afforded to parents, taking into consideration the age of the child and type or severity of disability.

(20 U.S.C. 1412(2)(D); 1417(c))

Comment. Note that under the regulations for the Family Educational Rights and Privacy Act (45 CFR 99.44(a)), the rights of parents regarding education records are transferred to the student at age 18.

Reg. 300.575 Enforcement.

The State educational agency shall describe in its annual program plan the policies and procedures, including sanctions, which the State uses to insure that its policies and procedures are followed and that the requirements of the Act and the regulations in this part are met.

(20 U.S.C. 1412(2)(D); 1417(c))

Reg. 300.576 Office of Education.

If the Office of Education or its authorized representatives collect any personally identifiable information regarding handicapped children which is not subject to 5 U.S.C. 552a (The Privacy Act of 1974), the Commissioner shall apply the requirements of 5 U.S.C. Section 552a.(b)(1)-(2), (4)-(11); (c); (d); (e)(1); (2); (3)(A), (B), and (D), (5)-(10); (h); (m); and (n), and the regulations implementing those provisions in Part 5b of this title.

(20 U.S.C. 1412(2)(D); 1417(c))

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OFFICE OF EDUCATION PROCEDURES

Reg. 300.580 Opportunity for a hearing.

The Commissioner gives a State educational agency reasonable notice and an opportunity for a hearing before taking any of the following actions:

(a) Disapproval of a State's annual program plan under Reg. 300.113 of Subpart B.

(b) Withholding payments from a State under Reg. 300.590 or under Section 434(c) of the General Education Provisions Act.

(c) Waiving the requirement under Reg. 300.589 of this subpart regarding supplementing and supplanting with funds provided under Part B of the Act.

(20 U.S.C. 1232c(c); 1413(a)(9)(B); 1413(c); 1416)

Reg. 300.589 Waiver of requirement regarding supplementing and supplanting with Part B funds.

(a) Under Sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act, State and local educational agencies must insure that Federal funds provided under Part B of the Act are used to supplement the level of State and local funds expended for the education of handicapped children, and in no case to supplant those State and local funds. Beginning with funds appropriated for fiscal year 1979 and for each following fiscal year, the nonsupplanting requirement only applies to funds allocated to local educational agencies. (See Reg. 300.372.)

(b) If the State provides clear and convincing evidence that all handicapped children have available to them a free appropriate public education, the Commissioner may waive in part the requirement under Sections 613(a)(9)(B) and 614(a)(2)(B)(ii) of the Act if the Commissioner concurs with the evidence provided by the State.

(c) If a State wishes to request a waiver, it must inform the Commissioner in writing. The Commissioner then provides the State with a finance and membership report form which provides the basis for the request.

(d) In its request for a waiver, the State shall include the results of a special study made by the State to obtain evidence of the availability of a free appropriate public education to all handicapped children. The special study must include statements by a representative sample of organizations which deal with handicapped children, and parents and teachers of handicapped children, relating to the following areas:

(1) The adequacy and comprehensiveness of the State's system for locating, identifying, and evaluating handicapped children, and

(2) The cost to parents, if any, for education for children enrolled in public and private day schools, and in public and private residential schools and institutions, and

(3) The adequacy of the State's due process procedures.

(e) In its request for a waiver, the State shall include finance data relating to the availability of a free appropriate public education for all handicapped children, including:

(1) The total current expenditures for regular education programs and special education programs by function and by source of funds (State, local, and Federal) for the previous school year, and

(2) The full-time equivalent membership of students enrolled in regular programs and in special programs in the previous school year.

(f) The Commissioner considers the information which the State provides under paragraph (d) and (e) of this section, along with any additional information he may request, or obtain through on-site reviews of the State's education programs and records, to determine if all children have available to them a free appropriate public education, and if so, the extent of the waiver.

(g) The State may request a hearing under Regs. 300.580-300.583 with regard to any final action by the Commissioner under this section.

(20 U.S.C. 1411(c)(3); 1413(a)(9)(B))

[The next page is 102:89.]

Subpart F—State Administration

STATE EDUCATIONAL AGENCY RESPONSIBILITIES: GENERAL

Reg. 300.600 Responsibility for all educational programs.

(a) The State educational agency is responsible for insuring:

(1) That the requirements of this part are carried out; and

(2) That each educational program for handicapped children administered within the State, including each program administered by any other public agency:

(i) Is under the general supervision of the persons responsible for educational programs for handicapped children in the State educational agency, and

(ii) Meets education standards of the State educational agency (including the requirements of this part).

(b) The State must comply with paragraph (a) of this section through State statute, State regulation, signed agreement between respective agency officials, or other documents.

(20 U.S.C. 1412(6))

Comment. The requirement in Reg. 300.600(a) is taken essentially verbatim from section 612(6) of the statute and reflects the desire of the Congress for a central point of responsibility and accountability in the education of handicapped children within each State. With respect to State educational agency responsibility, the Senate Report on P.L. 94-142 includes the following statements:

This provision is included specifically to assure a single line of responsibility with regard to the education of handicapped children, and to assure that in the implementation of all provisions of this Act and in carrying out the right to education for handicapped children, the State educational agency shall be the responsible agency * * *.

Without this requirement, there is an abdication of responsibility for the education of handicapped children. Presently, in many States, responsibility is divided, depending upon the age of the handicapped child, sources of funding, and type of services delivered. While the Committee understands that different agencies may, in fact, deliver services, the responsibility must remain in a central agency overseeing the education of handicapped children, so that failure to deliver services or the violation of the rights of handicapped children is squarely the responsibility of one agency. (Senate Report No. 94-168, p. 24 (1975))

In meeting the requirements of this section, there are a number of acceptable options which may be adopted, including the following:

(1) Written agreements are developed between respective State agencies concerning State educational agency standards and monitoring. These agreements are binding on the local or regional counterparts of each State agency.

(2) The Governor's Office issues an administrative directive establishing the State educational agency responsibility.

(3) State law, regulation, or policy designates the State educational agency as responsible for establishing standards for all educational programs for the handicapped, and includes responsibility for monitoring.

(4) State law mandates that the State educational agency is responsible for all educational programs.

USE OF FUNDS

Reg. 300.620 Federal funds for State administration.

A State may use five percent of the total State allotment in any fiscal year under Part B of the Act, or $200,000, whichever is greater, for administrative costs related to carrying out sections 612 and 613 of the Act. However, this amount cannot be greater than the amount which the State may use under Reg. 300.704 or Reg. 300.705, as the case may be.

(20 U.S.C. 1411(b), (c))

Reg. 300.621 Allowable costs.

(a) The State educational agency may use funds under Reg. 300.620 of this Subpart for:

(1) Administration of the annual program plan and for planning at the State level, including planning, or assisting in the planning, of programs or projects for the education of handicapped children;

(2) Approval, supervision, monitoring, and evaluation of the effectiveness of local programs and projects for the education of handicapped children;

(3) Technical assistance to local educational agencies with respect to the requirements of this part;

(4) Leadership services for the program supervision and management of special education activities for handicapped children; and

(5) Other State leadership activities and consultative services.

(b) The State educational agency shall use the remainder of its funds under Reg. 300.620 in accordance with Reg. 300.370 of Subpart C.

(20 U.S.C. 1411(b), (c))

STATE ADVISORY PANEL

Reg. 300.650 Establishment.

(a) Each State shall establish, in accordance with the provisions of this subpart, a State advisory panel on the education of handicapped children.

(b) The advisory panel must be appointed by the Governor or any other official authorized under State law to make those appointments.

(c) If a State has an existing advisory panel that can perform the functions in Reg. 300.652, the State may modify the existing panel so that it fulfills all of the requirements of this subpart, instead of establishing a new advisory panel.

(20 U.S.C. 1413(a)(12))

Reg. 300.651 Membership.

(a) The membership of the State advisory panel must be composed of persons involved in or concerned with the education of handicapped children. The membership must include at least one person representative of each of the following groups:

(1) Handicapped individuals.

(2) Teachers of handicapped children.

(3) Parents of handicapped children.

(4) State and local educational officials.

(5) Special education program administrators.

(b) The State may expand the advisory panel to include additional persons in the groups listed in paragraph (a) of this section and representatives of other groups not listed.

(20 U.S.C. 1413(a)(12))

Comment. The membership of the State advisory panel, as listed in paragraphs (a)(1)-(5), is required in section 613(a)(12) of the Act. As indicated in paragraph (b), the composition of the panel and the number of members may be expanded at the discretion of the State. In adding to the membership, consideration could be given to having:

(1) An appropriate balance between professional groups and consumers (i.e., parents, advocates, and handicapped individuals);

(2) Broad representation within the consumer-advocate groups, to insure that the interests and points of view of various parents, advocates and handicapped individuals are appropriately represented;

(3) Broad representation within professional groups (e.g., (a) regular education personnel, (b) special educators, including teachers, teacher trainers, and administrators, who can properly represent various dimensions in the education of handicapped children, and (c) appropriate related services personnel); and

(4) Representatives from other State advisory panels (such as vocational education).

If a State elects to maintain a small advisory panel (e.g., 10-15 members), the panel itself could take steps to insure that it (1) consults with and receives input from various consumer and special interest professional groups, and (2) establishes committees for particular short-term purposes composed of representatives from those input groups.

Reg. 300.652 Advisory panel functions.

The State advisory panel shall:

(a) Advise the State educational agency of unmet needs within the State in the education of handicapped children;

(b) Comment publicly on the State annual program plan and rules or regulations proposed for issuance by the State regarding the education of handicapped children and the procedures for distribution of funds under this part; and

(c) Assist the State in developing and reporting such information and evaluations as may assist the Commissioner in the performance of his responsibilities under Section 618.

(20 U.S.C. 1413(a)(12))

Reg. 300.653 Advisory panel procedures.

(a) The advisory panel shall meet as often as necessary to conduct its business.

(b) By July 1 of each year, the advisory panel shall submit an annual report of panel activities and suggestions to the

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State educational agency. This report must be made available to the public in a manner consistent with other public reporting requirements under this part.

(c) Official minutes must be kept on all panel meetings and shall be made available to the public on request.

(d) All advisory panel meetings and agenda items must be publicly announced prior to the meeting, and meetings must be open to the public.

(e) Interpreters and other necessary services must be provided at panel meetings for panel members or participants. The State may pay for these services from funds under Reg. 300.620.

(f) The advisory panel shall serve without compensation but the State must reimburse the panel for reasonable and necessary expenses for attending meetings and performing duties. The State may use funds under Reg. 300.620 for this purpose.

(20 U.S.C. 1413(a)(12))

Subpart G—Allocation of Funds; Reports

ALLOCATIONS

Reg. 300.700 Special definition of the term State.

For the purposes of Regs. 300.701, 300.702, and 300.704-300.708, the term "State" does not include Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(20 U.S.C. 1411(a)(2))

Reg. 300.701 State entitlement; formula.

(a) The maximum amount of the grant to which a State is entitled under section 611 of the Act in any fiscal year is equal to the number of handicapped children aged three through 21 in the State who are receiving special education and related services, multiplied by the applicable percentage, under paragraph (b) of this section, of the average per pupil expenditure in public elementary and secondary schools in the United States.

(b) For the purposes of the formula in paragraph (a) of this section, the applicable percentage of the average per pupil expenditure in public elementary and secondary schools in the United States for each fiscal year is:

(1) 1978—5 percent,
(2) 1979—10 percent,
(3) 1980—20 percent,
(4) 1981—30 percent,
(5) 1982, and for each fiscal year after 1982, 40 percent.

(20 U.S.C. 1411(a)(1))

(c) For the purposes of this section, the averge per pupil expenditure in public elementary and secondary schools in the United States, means the aggregate expenditures during the second fiscal year preceding the fiscal year for which the computation is made (or if satisfactory data for that year are not available at the time of computation, then during the most recent preceding fiscal year for which satisfactory data are available) of all local educational agencies in the United States (which, for purposes of this section, means the fifty States and the District of Columbia), plus any direct expenditures by the State for operation of those agencies (without regard to the source of funds from which either of those expenditures are made), divided by the aggregate number of children in average daily attendance to whom those agencies provided free public education during that preceding year.

(20 U.S.C. 1411(a)(4))

Reg. 300.702 Limitations and exclusions.

(a) In determining the amount of a grant under Reg. 300.701 of this subpart, the Commissioner may not count:

(1) Handicapped children in a State to the extent that the number of those children is greater than 12 percent of the number of all children aged five through 17 in the State; and

(2) Children with specific learning disabilities to the extent that the number of those children is greater than two percent of the number of all children aged five through 17 in the State; and

(3) Handicapped children who are counted under section 121 of the Elementary and Secondary Education Act of 1965.

(b) For the purposes of paragraph (a) of this section, the number of children aged five through 17 in any State shall be determined by the Commissioner on the basis of the most recent satisfactory data available to him.

(20 U.S.C. 1411(a)(5))

[Subparagraph (a)(2) was deleted in 42 Fed. Reg. 65083 (Dec. 29, 1977); however, subparagraph (a)(3) was not renumbered.]

Reg. 300.703 Ratable reductions.

(a) *General.* If the sums appropriated for any fiscal year for making payments to States under section 611 of the Act are not sufficient to pay in full the total amounts to which all States are entitled to receive for that fiscal year, the maximum amount which all States are entitled to receive for that fiscal year shall be ratably reduced. In case additional funds become available for making payments for any fiscal year during which the preceding sentence is applicable, those reduced amounts shall be increased on the same basis they were reduced.

(20 U.S.C. 1411(g)(1))

(b) *Reporting dates for local educational agencies and allocations.*

(1) In any fiscal year in which the State entitlements have been ratably reduced, and in which additional funds have not been made available to pay in full the total of the amounts under paragraph (a) of this section, the State educational agency shall fix dates before which each local educational agency shall report to the State the amount of funds available to it under this part which it estimates it will expend.

(2) The amounts available under paragraph (a)(1) of this section, or any amount which would be available to any other local educational agency if it were to submit an application meeting the requirements of this part, which the State educational agency determines will not be used for the period of its availability, shall be available for allocation to those local educational agencies, in the manner provided in Reg. 300.707, which the State educational agency determines will need and be able to use additional funds to carry out approved programs.

(20 U.S.C. 1411(g)(2))

Reg. 300.704 Hold harmless provision.

No State shall receive less than the amount it received under Part B of the Act for fiscal year 1977.

(20 U.S.C. 1411(a)(1))

Reg. 300.705 Within-State distribution: fiscal year 1978.

Of the funds received under Reg. 300.701 of this subpart by any State for fiscal year 1978:

(a) 50 percent may be used by the State in accordance with the provisions of Reg. 300.620 of Subpart F and Reg. 300.370 of Subpart C, and

(b) 50 percent shall be distributed to local educational agencies in the State in accordance with Reg. 300.707.

(20 U.S.C. 1411(b)(1))

Reg. 300.706 Within-State distribution: fiscal year 1979 and after.

Of the funds received under Reg. 300.701 by any State for fiscal year 1979, and for each fiscal year after fiscal year 1979:

(a) 25 percent may be used by the State in accordance with Reg. 300.620 of Subpart F and Reg. 300.370 of Subpart C, and

(b) 75 percent shall be distributed to the local educational agencies in the State in accordance with Reg. 300.707.

(20 U.S.C. 1411(c)(1))

Reg. 300.707 Local educational agency entitlements; formula.

From the total amount of funds available to all local educational agencies, each local educational agency is entitled to an amount which bears the same ratio to the total amount as the number of handicapped children aged three through 21 in that agency who are receiving special education and related services bears to the aggregate number of handicapped children aged three through 21 receiving special education and related services in all local educational agencies which apply to the State educational agency for funds under Part B of the Act.

(20 U.S.C. 1411(d))

Reg. 300.708 Reallocation of local educational agency funds.

If a State educational agency determines that a local educational agency is adequately providing a free appropriate public education to all handicapped children residing in the area served by the local agency with State and local funds otherwise available to the local agency, the State educational agency may reallocate funds (or portions of those funds which are not required to provide special education and related services) made available to the local agency under Reg. 300.707, to other local educational agencies within the State which are not adequately providing special education and related services to all handicapped children residing in the areas served by the other local educational agencies.

(20 U.S.C. 1414(e))

Reg. 300.709 Payments to Secretary of Interior.

(a) The Commissioner is authorized to make payments to the Secretary of the Interior according to the need for that assistance for the education of handicapped children on reservations serviced by elementary and secondary schools operated for Indian children by the Department of the Interior.

(b) The amount of those payments for any fiscal year shall not exceed one percent of the aggregate amounts available to all States for that fiscal year under Part B of the Act.

(20 U.S.C. 1411(f)(1))

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Reg. 300.710 Entitlements to jurisdictions.

(a) The jurisdictions to which this section applies are Guam, American Samoa, the Virgin Islands, and the Trust Territory of the Pacific Islands.

(b) Each jurisdiction under paragraph (a) of this section is entitled to a grant for the purposes set forth in section 601(c) of the Act. The amount to which those jurisdictions are so entitled for any fiscal year shall not exceed an amount equal to 1 percent of the aggregate of the amounts available to all States under this part for that fiscal year. Funds appropriated for those jurisdictions shall be allocated proportionately among them on the basis of the number of children aged three through twenty-one in each jurisdiction. However, no jurisdiction shall receive less than $150,000, and other allocations shall be ratably reduced if necessary to insure that each jurisdiction receives at least that amount.

(c) The amount expended for administration by each jurisdiction under this section shall not exceed 5 percent of the amount allotted to the jurisdiction for any fiscal year, or $35,000, whichever is greater.

(20 U.S.C. 1411(e))

REPORTS

Reg. 300.750 Annual report of children served—report requirement.

(a) The State educational agency shall report to the Commissioner no later than February 1 of each year the number of handicapped children aged three through 21 residing in the State who are receiving special education and related services.

(b) The State educational agency shall submit the report on forms provided by the Commissioner.

(20 U.S.C. 1411(a)(3))

Comment. It is very important to understand that this report and the requirements that relate to it are solely for allocation purposes. The population of children the State may count for allocation purposes may differ from the population of children to whom the State must make available a free appropriate public education. For example, while section 611(a)(5) of the Act limits the number of children who may be counted for allocation purposes to 12 percent of the general school population aged five through seventeen, a State might find that 14 percent (or some other percentage) of its children are handicapped. In that case, the State must make free appropriate public education available to all of those handicapped children.

Reg. 300.751 Annual report of children served—information required in the report.

(a) In its report, the State educational agency shall include a table which shows:

(1) The number of handicapped children receiving special education and related services on December 1 of that school year;

(2) The number of those handicapped children within each disability category, as defined in the definition of "handicapped children" in Reg. 300.5 of Subpart A; and

(3) The number of those handicapped children within each of the following age groups:

(i) Three through five;

(ii) Six through seventeen; and

(iii) Eighteen through twenty-one.

(b) A child must be counted as being in the age group corresponding to his or her age on the date of the count: October 1 or February 1, as the case may be.

(c) The State educational agency may not report a child under more than one disability category.

(d) If a handicapped child has more than one disability, the State educational agency shall report that child in accordance with the following procedure:

(1) A child who is both deaf and blind must be reported as "deaf-blind."

(2) A child who has more than one disability (other than a deaf-blind child) must be reported as "multihandicapped."

(20 U.S.C. 1411(a)(3); 1411(a)(5)(A)(ii); 1418(b))

Reg. 300.752 Annual report of children served—certification.

The State educational agency shall include in its report a certification signed by an authorized official of the agency that the information provided is an accurate and unduplicated count of handicapped children receiving special education and related services on the dates in question.

(20 U.S.C. 1411(a)(3); 1417(b))

Reg. 300.753 Annual report of children served—criteria for counting children.

(a) The State educational agency may include handicapped children in its report who are enrolled in a school or program which is operated or supported by a public agency, and which either:

(1) Provides them with both special education and related services; or

(2) Provides them only with special education if they do not need related services to assist them in benefiting from that special education.

(b) The State educational agency may not include handicapped children in its report who:

(1) Are not enrolled in a school or program operated or supported by a public agency;

(2) Are not provided special education that meets State standards;

(3) Are not provided with a related service that they need to assist them in benefiting from special education;

(4) Are counted by a State agency under Section 121 of the Elementary and Secondary Education Act of 1965, as amended; or

(5) Are receiving special education funded solely by the Federal Government. However, the State may count children covered under Reg. 300.186(b) of Subpart B.

(20 U.S.C. 1411(a)(3); 1417(b))

Comment. 1. Under paragraph (a), the State may count handicapped children in a Head Start or other preschool program operated or supported by a public agency if those children are provided special education that meets State standards.

2. "Special education," by statutory definition, must be at no cost to parents. As of September 1, 1978, under the free appropriate public education requirement, both special education and related services must be at no cost to parents.

There may be some situations, however, where a child receives special education from a public source at no cost, but whose parents pay for the basic or regular education. This child may be counted. The Office of Education expects that there would only be limited situations where special education would be clearly separate from regular education—generally, where speech therapy is the only special education required by the child. For example, the child might be in a regular program in a parochial or other private school but receiving speech therapy in a program funded by the local educational agency. Allowing these children to be counted will provide incentives (in addition to complying with the legal requirement in Section 613(a)(4)(A) of the Act regarding private schools) to public agencies to provide services to children in private schools, since funds are generated in part on the basis of the number of children provided special education and related services. Agencies should understand, however, that where a handicapped child is placed in or referred to a public or private school for educational purposes, special education includes the entire educational program provided to the child. In that case, parents may not be charged for any part of the child's education.

A State may not count Indian children on or near reservations and children on military facilities if it provides them no special education. If a State or local educational agency is responsible for serving these children, and does provide them special education and related services, they may be counted.

Reg. 300.754 Annual report of children served—other responsibilities of the State educational agency.

In addition to meeting the other requirements in this subpart, the State educational agency shall:

(a) Establish procedures to be used by local educational agencies and other educational institutions in counting the number of handicapped children receiving special education and related services;

(b) Set dates by which those agencies and institutions must report to the State educational agency to insure that the State complies with Reg. 300.750(a);

(c) Obtain certification from each agency and institution that an unduplicated and accurate count has been made;

(d) Aggregate the data from the count obtained from each agency and institution, and prepare the reports required under this subpart; and

(e) Insure that documentation is maintained which enables the State and the Commissioner to audit the accuracy of the count.

(20 U.S.C. 1411(a)(3); 1417(b))

Comment. States should note that the data required in the annual report of children served are not to be transmitted to the Commissioner in personally identifiable form. States are encouraged to collect these data in non-personally identifiable form.

[Appendix A. Analysis of Final Regulation, was removed from the Code of Federal Regulations in 43 Fed. Reg. 57255 (Dec. 7, 1978). The text of Appendix A is reproduced in Volume I, "Legislative History: P.L. 94-142 and Regulations."]

[Regional Resource Centers begins on page 102:501.]

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APPENDIX C

WYOMING RULES

WYOMING STATE BOARD OF EDUCATION
RULES AND REGULATIONS GOVERNING
PROGRAMS AND SERVICES FOR
HANDICAPPED CHILDREN IN WYOMING SCHOOL DISTRICTS

WYOMING STATE DEPARTMENT OF EDUCATION
LYNN O. SIMONS
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

March 2, 1981

These Rules and Regulations apply to all Wyoming school districts and to all agencies which provide educational programs and services for handicapped children.

STATE BOARD OF EDUCATION
State of Wyoming

I certify that the copy hereto attached is a true copy of the Wyoming State Board of Education Rules and Regulations Governing Programs and Services for Handicapped Children in Wyoming School Districts and is in accordance with the Wyoming Administrative Procedure Act (W.S. 9-4-101 through 9-4-115), W.S. 21-14-102, and that the original Rules are on file with the State Superintendent of Public Instruction. These Rules supersede all other Rules previously filed dealing with this subject.

Prior to adoption, these Rules were made available for public inspection on July 10, 1980, and a notice of intended adoption was sent to the Office of the Attorney General and the Legislative Service Office.

The Rules have been approved by the Governor as indicated below.

The attached Rules are effective immediately upon filing below.

Signed this 27th day of August, 1980.

STATE OF WYOMING } SS
Office of the Secretary

Filed the 2ND day of MARCH
19 81 at 10:45 A.M.
THYRA THOMSON
Secretary of State

Secretary of State

Donald Blakeslee
Donald Blakeslee, Chairman
State Board of Education

RECEIVED
MAR 2 1981
Secretary of State
Wyoming

Reviewed and Approved by
the Governor

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MAR 2 1981

TABLE OF CONTENTS

CHAPTER IX

GENERAL PROVISIONS

Section No.	Subject	Page No.
1	Authority	114
2	Applicability	114
3	Promulgation, Amendment or Repeal of Rules	114
4	Definitions	114

CHAPTER X

REQUIREMENT FOR FULL EDUCATIONAL SERVICES

Section No.	Subject	Page No.
1	Legislative Mandate	114
2	Full Service Implementation Date	114

CHAPTER XI

REGULATIONS AND PROCEDURES FOR EDUCATIONAL AND OTHER SERVICE RELATED AGENCIES

Section No.	Subject	Page No.
1	Scope of School District Regulations and Date to be Submitted	115
2	Scope of Regulations to be Submitted by Other Agencies	116
3	Normalization of Educational Experiences	116
4	Child Identification	117
5	Due Process Assurances	118
6	Referral for Special Services	122
7	Assessment of Children	122
8	The Child's Individualized Educational Program	124
9	Child Study Committee	125
10	High School Graduation	126
11	In-Service Preparation	126
12	Pupil Records	126
13	Placements in Private Schools and Facilities	127

CHAPTER XII

GENERAL REGULATIONS REGARDING THE ELIGIBILITY OF CHILDREN

Section No.	Subject	Page No.
1	Eligibility Criteria	127

APPENDICES

Appendices	Subject	Page No.
Appendix A	Continuum of Least Restrictive Educational Alternatives (Normalization) for Handicapped Children and Youths	130
Appendix B	Surrogate Parents	131
Appendix C	Wyoming Public Records Act	133
Appendix D	Rules and Regulations Governing Protection of the Confidentiality of Personally Identifiable Data, Information and Records that are Collected, Maintained or Used by Wyoming Educational Agencies	138
Appendix E	Definitions	143

WYOMING STATE BOARD OF EDUCATION
RULES AND REGULATIONS GOVERNING
PROGRAMS AND SERVICES FOR
HANDICAPPED CHILDREN IN WYOMING SCHOOL DISTRICTS

Chapter IX

General Provisions

Section 1. Authority. These rules providing an organized system for conducting programs for handicapped children are adopted as authorized by the Wyoming Administrative Procedure Act (W.S. 9-4-101 through 9-4-115), the Wyoming Public Records Act (W.S. 9-9-101 through 9-9-105), P.L. 93-380 (P.L. 93-380, 20 U.S.C. 1413, 45 C.F.R. 121(a) (1975)), P.L. 94-142 and W.S. 21-14-102.

Section 2. Applicability. These rules and amendments thereto shall govern the operation of all programs and services provided by local school districts for the education of handicapped children as authorized by W.S. 21-14-101 through 21-14-103. They shall be read and considered in conjunction with the policies and recommendations of the Office for Handicapped Children.

Section 3. Promulgation, Amendment or Repeal of Rules. Any amendments to these rules shall become effective as provided by the Wyoming Administrative Procedure Act (W.S. 9-4-101 through 9-4-115).

Section 4. Definitions. As set forth in these rules.

Chapter X

Requirement for Full Educational Services

Section 1. Legislative Mandate. The 40th Wyoming Legislature mandated that every school-age child in Wyoming with a "...mental, physical or psychological handicap or social maladjustment which impairs learning shall be entitled to and shall receive a free and appropriate education in accordance with his capabilities." The mandate further states that each school district shall "...provide for appropriate diagnosis, evaluation, education or training, and necessary related services for such children..." residing in the district. "The state board, jointly with the board of trustees of each school district, shall have general supervision and responsibility for the education of all children in the state with such handicaps, and the state board shall adopt reasonable rules and regulations to assure that each child receives a free and appropriate education in accordance with his capabilities." (W.S. 21-14-101 through 21-14-103.)

Section 2. Full Service Implementation Date. With enactment of W.S. 21-14-101 through 21-14-103, each Wyoming school district is

responsible for identifying all handicapped school-age children who reside in the district and for providing them with a free, appropriate education. Districts may be subject to legal action for failure to appropriately serve handicapped children. It is the responsibility of the district to designate a person to coordinate preparation and implementation of the district's regulations and procedures for educating handicapped children.

Chapter XI

Regulations and Procedures for Educational and Other Service Related Agencies

Section 1. Scope of School District Regulations and Date to be Submitted. Each school district shall adopt, file as provided by the Wyoming Administrative Procedure Act, and implement local regulations and procedures regarding the operation of the district's educational programs and services for handicapped children. The local regulations shall include, but are not limited to, provisions for:

a. normalization of educational experiences for handicapped children;

b. identification of all handicapped children who are residents of the district;

c. assurance of the due process rights of children and their parents, including (1) notification procedures, (2) parental approval of special services and instructional programs, (3) appointment of a surrogate parent when the child's parents or guardians are not known, are unavailable or when the child is a ward of the state, (4) parental review of relevant school records and (5) opportunity for an impartial due process hearing;

d. referral of children for special services;

e. assessment of children;

f. individualized educational programs for handicapped children;

g. appointment and functioning of a Child Study Committee to facilitate the evaluation, placement, review and reassignment of each handicapped child (A separate committee must be appointed for each child.);

h. graduation of handicapped youths from high school;

i. in-service preparation for all staff members in the education of handicapped children;

j. placements in private schools and facilities.

The district has considerable latitude in determining the content of its regulations, but criteria which have been mandated by the State Board of Education must be incorporated into the district's regulations.

Section 2. Scope of Regulations to be Submitted by Other Agencies which Provide Educational Programs and Services for Handicapped Children and Date to be Submitted. By August 31, 1979, each agency or institution using public funds for the education of handicapped children shall also adopt, submit for filing as provided by the Administrative Procedure Act, and implement regulations and procedures regarding the operation of the agency's educational programs and services for handicapped children. The agency's regulations shall include, but not be limited to, all subsections of Section 1 of this Chapter, except subsection "b".

Section 3. Normalization of Educational Experiences.

a. Special instructional programs and services are components of a supportive system designed to complement regular education. Consequently, all services for handicapped children emanate from the regular classroom. Each school district shall adopt regulations and procedures to assure that to the maximum extent appropriate handicapped children are educated in regular classes along with children who are not handicapped; however, placement of handicapped children in regular classes must be appropriate to their needs and must be determined, monitored, re-evaluated and modified by using the same procedures as those outlined in these rules for handicapped children in special educational programs.

b. Each school district shall insure that a continuum of alternative placements is available to meet the special education and related needs of handicapped children. The continuum must include instruction in regular classes, special classes, special schools, home instruction, instruction in hospitals and institutions and make provision for supplementary services (such as resource room or itinerant instruction) to be provided in conjunction with regular class placement. Appendix A contains a continuum of least restrictive educational alternatives for district reference.

c. Placement of handicapped children in itinerant programs, resource rooms and special classes and other procedures which remove them from the regular education environment shall occur only when there is clear evidence that the learning problems are of such nature and severity that education in regular classes, even with the use of supplementary resources, cannot be achieved satisfactorily. All placements must be appropriate to the child's needs and provide the least restrictive educational environment appropriate. Educational goals and objectives shall be specified and implemented via an individualized educational program. When these goals and objectives are met the child shall move progressively through educational environments that are as normal and beneficial as possible with the ultimate goal, when appropriate, being full-time functioning in regular classes.

d. Each handicapped child's educational placement shall be:

(1) determined at least annually;

(2) based on the child's individualized education program;

(3) as close as possible to the child's home; and

(4) in the school he or she would attend if not handicapped, unless the child's individualized education program requires some other arrangement.

e. Handicapped children shall participate with non-handicapped children in non-academic and extra-curricular services and activities to the maximum extent appropriate to their needs.

f. In selecting the least restrictive environment, consideration shall be given to any potential harmful effect on the child or the quality of services the child needs.

Section 4. Child Identification.

a. Each school district shall adopt regulations and procedures for implementing and maintaining an ongoing system to locate and assess handicapped children, ages birth through 21, who are residents of the district. The purpose of this system shall be to identify all handicapped children who need special education and related services and to implement appropriate services at the earliest age possible.

The child identification program (child-find) shall be comprised of, but not limited to: (a) public awareness with specific emphasis on parent awareness of the program, which is the primary responsibility of the State Department of Education, (b) search for all handicapped children, (c) assessment to validate the presence of a handicap which impairs learning and to identify those children who need special education and related services, (d) referral for additional services, (e) delivery of instructional and related services when appropriate and, (f) periodic reassessment of the children to determine their progress subsequent to the provision of services.

The child-find system developed by the local education agency necessitates cooperative efforts between the state agencies responsible for the education of handicapped children and local school districts. Although each school district is obligated to implement and maintain an ongoing child identification program that includes all the components stated in the preceding paragraph, the major responsibilities of the district involve components (b) through (f). School districts are responsible for the identification of handicapped preschool children, but resources other than state or local public education funds must be used to fund the assessments and any instructional and related services that are needed.

b. The district search for handicapped children who need special education and related services shall be aggressive, systematic and ongoing through use of procedures such as screening and child assessment

programs, communication and coordination with appropriate public and private agencies, organizations and individuals involved with handicapped children, school group testing and behavior observation programs.

c. Each district shall appoint a staff member to facilitate the district child-find program. The functions of the facilitator shall include, but not be limited to, (a) serving as a central source of information regarding the district child-find program to communities served by the school district, (b) functioning as a central point of referral for children reported by their parents/guardians as handicapped or as suspected of being handicapped and, (c) serving as a liaison between the school district and the State Department of Education concerning reporting and documenting the district child-find program.

Section 5. Due Process Assurances. Due process assurances are legal expressions of the dignity and worth of children and of the district's commitment to their healthy development and progress. It is the responsibility of the school district to adopt regulations and procedures to include, but not be limited to, the following:

a. Written notice shall be given to the parents of a handicapped child a reasonable amount of time before the district:

(1) initiates or changes the identification, evaluation or educational placement of the child or the provision of a free appropriate public education to the child;

(2) refuses to initiate or change the identification, evaluation or educational placement of the child or the provision of a free appropriate public education to the child.

b. The content of the notice shall include:

(1) a full explanation of all of the procedural safeguards available to the parents under State Board regulations for handicapped children;

(2) a description of the action proposed or refused by the district, an explanation of why the district proposes or refuses to take the action, and a description of all options the district considered and the reasons why those options were accepted or rejected;

(3) a description of each evaluation procedure, test, record or report the district uses as a basis for the proposal or refusal; and

(4) a description of any other factors which are relevant to the district's proposal or refusal.

c. The notice must be:

(1) written in language understandable to the general public; and

(2) provided in the native language of the parent or other mode of communication used by the parent unless it is clearly not feasible to do so.

d. If the native language or other mode of communication of the parent is not a written language, the district shall take steps to ensure that:

(1) the notice is translated orally or by other means to the parent in his or her native language or other mode of communication;

(2) the parent understands the content of the notice;

(3) there is written evidence that the requirements in paragraphs (1) and (2) of this subsection have been met.

e. Written parental consent shall be obtained before the school:

(1) conducts a preplacement assessment or a comprehensive reassessment;

(2) provides other special services;

(3) places a handicapped child in a special instructional program or related service;

(4) removes a child from a special instructional program.

f. Appointment of a surrogate parent to serve as an advocate of the child's rights when the child's parents or guardians are not known, are unavailable or when the child is a ward of the state. Surrogate parents may not be employees of the state or local education agency or agencies involved in the education or care of children. They should (a) have no other vested interest that would conflict with their roles as advocates to the children they represent, (b) be totally committed to the children and their educational needs, (c) be knowledgeable of the racial, cultural and linguistic background of the children they represent, (d) be familiar with the educational system of the district and state and (e) be familiar with the educational rights of handicapped children. School districts should formulate qualification standards that represent the best interests of the children. Appendix B contains suggestions for preparing this regulation.

g. Parental review of school district records relevant to the child.

h. A parent or guardian of a handicapped child or a local school district may, in accordance with this subsection, initiate an impartial, due process hearing on any matter pertaining to the identification, assessment, educational placement, or provision of a free, appropriate public education, as provided for in W.S. 21-14-101, for the handicapped child. Such hearings will be conducted under the following procedures:

(1) request for a hearing shall be made to the State Superintendent of Public Instruction.

(2) within five days after receiving a request for a hearing, the superintendent of the district and the State Superintendent of Public Instruction shall schedule a pre-hearing conference with the child's parents, involving such district and Department of Education personnel as may be necessary to review the situation for the purpose of resolving the differences and, if possible, avoid a hearing. (Other mediation steps may also be taken by mutual agreement between the parents and the local school district superintendent or his designee. The process of mediation is encouraged to resolve differences between parents and the district; however, mediation may not be used to deny or delay an aggrieved party's rights under this subsection.)

(3) if administrative and mediation efforts fail to settle the differences, a hearing shall be held before the State Board of Education or its designee. During the time a due process hearing is being conducted, the child involved will remain in his/her present placement unless otherwise mutually agreed upon by the parent and the school district. (This does not preclude the district from using its normal procedures for dealing with children who are endangering themselves or others.)

(4) the hearing shall be conducted by the State Board of Education or its designee. An official list of qualified designees shall be maintained and made available by the State Department of Education.

(5) the Wyoming Department of Education shall inform the parent or guardian of any free or local-cost legal and other relevant services available to them.

(6) any member of the State Board of Education who is an employee of the school district or other agency involved in the education or care of the subject child shall be excused from participating in the hearing as a member responsible for the conduct of the hearing.

(7) the Wyoming Department of Education shall be responsible for paying administrative costs related to the hearing, including necessary expenses incurred by the State Board of Education and stenographic services. The local school district, Department of Education, and the State Board of Education will not be responsible for any legal fees or other concomitant expenses incurred by the parent or guardian.

(8) the State Board of Education shall provide the parent or guardian and local school district officials written notice of the date, time, and place of the hearing. The hearing shall be conducted at a time and place reasonably convenient for the parties involved. Any party to the hearing has the right to present evidence and confront, cross-examine, compel the attendance of witnesses, and obtain a written or electronic verbatim record of the hearing.

(9) in the discretion of the State Board of Education or its designee, and upon request of either parent or guardian or local school district officials, a prehearing conference shall be held pursuant to scope and procedure outlined in Rule 16 of the Wyoming Rules of Civil Procedure. However, in no event will such prehearing conference be held later than five (5) days prior to the hearing. All references in Rule 16 to the "Court" shall be deemed to refer to the "State Board of Education or its designee." Further, all reference to the "Trial" in Rule 16 shall be deemed to refer to "hearing."

(10) the subject child shall be present at the hearing if parents or guardian request his/her presence. The hearing will not be open to the public unless parents or guardian so request.

(11) within 20 school days after the conclusion of the hearing and within 45 days after receipt of the request for the hearing, the State Board of Education or its designee shall render in writing, the findings of fact and decision concerning the appeal and forward this to the chief executive officer of the district of the child's residence. A written copy of the findings of fact and decision shall be mailed or personally delivered to the parents.

(12) any party who feels aggrieved by the findings and decision may appeal to the district court. Appeals from any such administrative finding and decision are taken in pursuant to Rule 12 of the Wyoming Rules of Appellate Procedure.

i. Provision for an independent assessment at district expense if serious unresolved parental challenges are made against the validity of the individual assessment provided by the school district.

(1) The school district shall provide to parents, on request, information about where an independent educational assessment may be obtained.

(2) Subject to subsection h, items (1) and (2) of this Chapter, the school district may request a due process hearing to show that its assessment is appropriate. If the final decision is that the evaluation is appropriate, the parent has the right to an independent educational assessment, but not at public expense.

(3) If the parent obtains an independent educational assessment at private expense, the results of the assessment must be considered by the district in any discussion made with respect to the provision of a free appropriate public education to the child. The results of the assessment may be presented as evidence at a due process hearing regarding the child.

(4) If the State Board of Education or its designee requests an independent educational assessment as part of a due process hearing, the cost of the assessment must be at public expense.

(5) When an independent assessment is at public expense,

the criteria under which the assessment is obtained, including the location of the evaluation and the qualifications of the examiner(s), must be the same as the criteria which the school district uses when it initiates an assessment.

Section 6. Referral for Special Services. Regulations and systematic procedures shall be adopted by the district for written referral for assessment of children who have or who are suspected of having learning and/or behavior problems which interfere with school performance. The regulations shall provide for the confidential use of information obtained during the referral, assessment and instructional processes.

Section 7. Assessment of Children. Each school district shall adopt regulations and procedures concerning the assessment of children. Each child placed in a special instructional program for handicapped children shall receive an individual assessment conducted by a multidisciplinary assessment team comprised of personnel who are appropriately certified and endorsed by the Wyoming State Department of Education and/or personnel who are properly licensed to render such services. Selection of the personnel and disciplines to comprise the assessment must be based on the child's presenting problem, concerns expressed by the referring source and the suspected handicap(s). At least one member of the assessment team must be knowledgeable in the area of the suspected disability.

a. The assessment shall be conducted using appraisal instruments and procedures that are necessary and appropriate to determine the child's learning problems, assets and deficits and to prescribe an individualized educational program. Assessment materials must have been validated for the specific purposes for which they are used during the assessment of the child and administered in conformance with the instructions provided by their producer.

b. Tests and assessment materials administered to a child with impaired sensory, manual or speaking skills must be selected so as to ensure results which accurately reflect the child's aptitude or achievement level.

c. All assessment materials and procedures shall be selected and administered so as not to be racially or culturally discriminatory.

d. The results of the assessment shall be interpreted to the child's parents in language they understand and in ways they can use to cooperate with the school and assist the child's educational progress.

e. When, under due process provisions, an assessment reveals that a child has been misclassified and/or incorrectly placed as a handicapped child, the school district is obligated to amend the information on its records and so inform the parent in writing.

f. When a handicapped child receives a preplacement assessment or a comprehensive reassessment, the multidisciplinary diagnostic team

shall prepare a written report on the results of the evaluation. The report must include, but not be limited to, the following:

(1) the date(s) the child was assessed;

(2) a list of the tests and procedures used to evaluate the child;

(3) the child's handicap and the basis for making the determination;

(4) recommendations concerning the education and any special services the child needs, and placement in the least restrictive educational environment;

(5) relevant behavior noted during assessment;

(6) effects of environmental, cultural or economic disadvantage; and

(7) written certification from each team member whether the report reflects his or her conclusions.

g. In evaluating a child suspected of having a specific learning disability, the multidisciplinary diagnostic team shall also:

(1) include the child's regular teacher or, if the child does not have a regular teacher, a regular classroom teacher qualified to teach a child of his or her age;

(2) have one team member other than the child's regular teacher observe the child's academic performance in the regular classroom setting;

(3) include in the written assessment report relevant behavior noted during the classroom observation of the child and the relationship of that behavior to the child's academic functioning;

(4) include in the written report educationally relevant medical findings, if any; and

(5) document whether there is a severe discrepancy between achievement and ability which cannot be corrected without special education and related services.

h. The report specified in subsection f of this section, test booklets and other significant information obtained during the assessment must be maintained in the district in such manner to provide maximum confidentiality to the child in accordance with the State Board of Education Rules and Regulations Governing Protection of the Confidentiality of Personally Identifiable Data. (See Appendix D of these rules.)

Section 8. The Child's Individualized Educational Program.

a. It is the obligation of those who examine the child, whether district personnel or personnel whose services are arranged for by special contracts, to translate the information obtained during the assessment process into appropriate written recommendations to be used in the development of the individualized educational program (IEP). The program is a blueprint for providing specially designed instruction to meet the handicapped child's unique educational needs. Each school district shall assure that an individualized educational program is written, implemented, monitored and updated at least annually for every handicapped child whose education is the responsibility of the district, including each handicapped child who is placed in or referred to a private or parochial school or facility by a public school district or who is enrolled in a parochial or other private school and receives special education or related services from a public school district.

b. The individualized educational program for each child must include:

(1) a statement of the child's present level of performance;

(2) a statement of annual goals, including short-term instructional objectives;

(3) a statement of the specific special education and related services to be provided to the child, and the extent to which the child will be able to participate in regular educational programs;

(4) the projected dates for initiation of services and the anticipated duration of the services;

(5) appropriate objective criteria and evaluation procedures and schedules for determining, on at least an annual basis, whether the short-term instructional objectives are being achieved.

At the beginning of each school year, each school district shall have in effect an IEP for every handicapped child who is receiving special education from the district. An IEP must be in effect before special education and related services are provided to a child and be implemented as soon as possible following the meeting specified under the subsection c of this section.

c. Each local school district is responsible for initiating and conducting IEP meetings for the purpose of developing, monitoring and revising a handicapped child's individualized educational program. Procedures for such meetings (i.e., Child Study Committee involvement) shall be established according to district rules and regulations, but the following requirements shall be incorporated into the district's procedures:

(1) a meeting shall be held within a reasonable period of time, but not later than 25 calendar days after a determination that the child needs special education and related services;

(2) a meeting shall be held at least annually to review each child's IEP and, if appropriate, to revise its provisions;

(3) the meeting shall include the child's teacher, one or both of the child's parents, the child when appropriate, a representative of the district who is qualified to provide or supervise the provision of special education, and other appropriate individuals at the discretion of the parent or school district. For a handicapped child who has been evaluated for the first time, a member of the evaluation team or someone who is knowledgeable about the evaluation procedures and results must be present;

(4) notification of the IEP meeting shall be made early enough to ensure that parents will have the opportunity to attend. The notice shall indicate the purpose, time, and location of the meeting, and who will be in attendance. Scheduling of the meeting should include a mutually agreed upon time and place. If neither parent can attend, the district shall use other methods of parent participation, including individual or conference telephone calls;

(5) if the parents do not attend, the district must have a record of its attempt to arrange a reasonable time and place for the meeting;

(6) the local school district shall take whatever action is necessary to ensure that the parent understands the proceedings at a meeting, including arrangements for an interpreter for parents who are deaf or whose native language is other than English.

d. The school district shall give the parent, on request, a copy of the individualized educational program.

e. Before a local school district places a handicapped child in or refers a child to a private school, the district shall initiate and conduct a meeting to develop an individualized educational program for that child:

(1) the local district shall ensure that a representative of the private school attends the meeting. If the representative cannot attend, the district shall use other methods to ensure its participation, including individual calls or conference calls.

(2) after a handicapped child enters the private school, meetings to review and revise the child's IEP may be initiated and conducted by the private school or facility at the discretion of the local district. If such meetings are initiated and conducted, local districts shall ensure that the parents and a representative from the district are involved in any decision about the child's IEP and agree to any proposed changes in the program before those changes are implemented.

Section 9. Child Study Committee. The Child Study Committee plays a vital role in the orderly progression of children through regular and special instructional programs.

a. Each school district shall establish a Child Study Committee and adopt regulations and procedures to facilitate the thoughtful evaluation, placement, progress review and reassignment of each handicapped child. A separate Child Study Committee must be appointed for each handicapped child.

b. District regulations shall be adopted concerning the duties and composition of the committee. The duties of the committee shall include, but are not limited to:

(1) reviewing data to determine whether a child meets the eligibility criteria for placement in an instructional program for handicapped children;

(2) designating appropriate instructional placement consistent with the principles of normalization of educational experiences;

(3) reviewing at least annually the educational progress of every school-age handicapped child in the district to determine the child's continuation in the program, modification of the program, additional assessment or reassignment.

c. When the Child Study Committee conducts the IEP meetings described in Section 8 of this Chapter, opportunity must be offered for participation of the child's parents. Deliberations of such Child Study Committee meetings shall be maintained in writing and written summaries of findings and recommendations for each child shall be signed by the participants and filed in the child's records.

Section 10. High School Graduation.

a. Each school district, in recognition of the fact that every handicapped child is entitled to the opportunity to graduate from high school, shall adopt written policies concerning the graduation of handicapped students. These regulations shall provide for the establishment of reasonable criteria for graduation.

Section 11. In-service Preparation. School districts shall prepare regulations and procedures to ensure that staff members of the district receive ongoing in-service preparation in the education of handicapped children. Particular emphasis shall be directed to preparing teachers to educate handicapped children who are enrolled in regular classes.

Section 12. Pupil Records. School districts shall prepare regulations and procedures to ensure compliance with the Wyoming Public Records Act (W.S. 9-9-101 through 9-9-105, Appendix C of these regulations), the Buckley Family Educational Rights and Privacy Act of 1974 (P.L. 93-380) and Appendix D of these regulations which set forth requirements to protect the privacy of parents and students relative to school records. The school district's general regulations regarding school maintenance and inspection will also apply in the implementation of these rules.

Section 13. Placements in Private Schools and Facilities. Each local education agency that places a handicapped child in or refers a handicapped child to a private school or facility as a means of providing the child with appropriate special education and related services shall ensure that:

a. the eligibility of a child for services and the placement of a child in such services are determined using the same regulations and procedures which apply to handicapped children in public schools;

b. the child receives special education and related services

(1) in conformance with all requirements of the State Board of Education, including the individualized educational program,

(2) at no cost to the parents or guardians,

(3) at a school or facility which meets State Board of Education standards,

(4) with all the rights accorded a handicapped child who is educated in a public school district,

c. the private agency or facility has copies of applicable State Board of Education standards and revisions as they occur;

d. when a handicapped child has available a free appropriate public education and the parents choose to place the child in a private school or facility, the public school is not required to pay for the child's education at the private school or facility;

e. disagreements between a parent and a public school regarding the availability of a program appropriate for the child and the question of financial responsibility are subject to due process procedures as prescribed in these rules.

Chapter XII

General Regulations Regarding the Eligibility of Children

Section 1. Eligibility Criteria. The following general criteria have been established by the State Board of Education for determining the eligibility of handicapped children who, regardless of the severity of their handicaps, are to be placed in special instructional programs for handicapped children.

a. Prior to placing a child in a special instructional program for handicapped children, the district shall obtain written documentation of the need for and appropriateness of the placement via an individual assessment conducted by a multidisciplinary team comprised of personnel who are appropriately certified and endorsed by the Wyoming State Department of Education and/or personnel who are properly li-

censed to render assessment services. The team shall validate the presence of a handicap which has impaired or is expected to impair the child's learning. This documentation shall include assessment of the child's vision and hearing and all areas related to the suspected disability, including where the multidisciplinary diagnostic team considers it to be necessary, adaptive behavior, current intellectual functioning, academic performance, communication skills, fine and gross motor performance and recommendations concerning the most appropriate placement within the least restrictive educational environment.

(1) A child who is a new resident of the school district and is known to have been in a special education program operated by the sending district, but whose assessment records have not yet been received, may, with written parental, guardian or surrogate parent consent and endorsement of the Child Study Committee, be provisionally placed in a special instructional program for handicapped children until the records are received, for a period not to exceed 25 school days. The child may not be counted toward funding of a special classroom until all eligibility criteria have been met.

b. Prior to placement in a special program for handicapped children, the child's parents shall give written consent to the placement. A Child Study Committee of the district must also recommend the placement.

c. A functional individualized educational program, derived from the individual assessment, shall be written and implemented for each child placed in a special instructional program for handicapped children and shall be maintained in a continuing state of evaluation and revision.

d. Placement in a special instructional program for handicapped children shall be made on the basis of an assessment which is appropriate to the child's age, culture and socio-economic background and which is consistent with Chapter XI, Section 7 of these regulations.

e. A child who does not have adequate command of the English language to express his or her school-related abilities may be enrolled in a special instructional program for handicapped children only after an individual learning assessment has been conducted by personnel knowledgeable about the child's general culture and fluent in both English and the language in which the child is most competent; when such personnel are unavailable, a language interpreter shall assist communication between the diagnosticians and the child during both assessment and the interpretation of the findings and recommendations. When possible, the interpreter should be knowledgeable about the child's general culture.

f. All communication, written and oral, with the parents of a child being considered for placement in a special instructional program for handicapped children shall be in the primary language of the home.

g. A systematic program shall be implemented by the district to continuously monitor and evaluate the progress of each child placed in a special instructional program for handicapped children.

h. Each child's continued placement in a special instructional program for handicapped children shall be determined at least annually by the Child Study Committee appointed for the child.

i. Each child enrolled in an instructional program for handicapped children shall be comprehensively re-evaluated at least every three years, or more frequently if the child's parent or teacher requests an assessment. Continuation in the program shall end when the child achieves the goals prescribed in his or her educational plan and can function full-time in the regular school program.

APPENDIX A

Continuum of Least Restrictive Educational Alternatives (Normalization) for Handicapped Children and Youths

Least Restrictive

1) Regular class placement

2) Regular class with modified curriculum

3) Regular class with consultation to teacher

4) Regular class with in-class assistance to child from special educator, tutor, etc.

5) Regular class - resource room (scheduled time arrangement)

6) Regular class - diagnostic/treatment center

7) Special class - regular class(es) (scheduled time arranged)

8) Special class - resource room

9) Special class full-time, little use of other in-school resources

10) Special class - diagnostic/treatment center

11) Special community day school

12) Homebound program

13) Residential school

Most Restrictive

14) Institutionalization

APPENDIX B

Surrogate Parents

Every child eligible for a public education in this state needs the protection of procedural due process. This protection is of even greater concern when the parents or guardians of a child are not known, unavailable, or the child is a ward of the state. In such circumstances the child may not have an adult outside of the school to serve as an advocate when, for example, progress in school is not satisfactory or when diagnostic services or placement in special instructional programs is being considered. In order to assure due process rights, the district shall make arrangements for the appointment of a surrogate parent to act as an advocate on behalf of each school-age child whose parents or guardians are unknown or unavailable, or when the child is a ward of the state.

It is the responsibility of the district to prepare local regulations and procedures concerning the appointment of surrogates. The following may be used as guidelines for implementing this program:

Standing Committee

It is suggested that the school district select a standing committee or board that is broadly representative of persons concerned with the education of handicapped children to be responsible for formulating and implementing the surrogate parent process. Many of the functions described below may be coordinated by this body.

Identification

In order to identify children who fall within the provisions of this rule, it is suggested that the standing committee contact local and state organizations and individuals.

Recruitment and Training

Through the standing committee, persons capable of serving as surrogate parents may be recruited and trained. Local guidelines may be needed concerning the maintenance of a registry of eligible persons. Individuals might be selected from local patrons who are concerned about the education of handicapped children. One individual could represent more than one child.

Procedures for Assigning Surrogates

Districts should formulate guidelines for the assignment of surrogate parents, making certain that the guidelines are flexible enough to meet the particular needs of children. The following procedures are suggested:

1. Any employee of any school district, community, state agency, residential school or hospital, any physician, judicial officer or any

other person whose work involves education, care or treatment of children and who knows that the parents or guardians of a handicapped child are unknown, unavailable, or that the child is a ward of the state, should file a request with the superintendent of the child's district for consideration or assignment of a surrogate parent, with a copy of the request to the standing committee.

2. In an effort to determine whether the parents or guardians are in fact unknown, unavailable, or the child is a ward of the state, the district should arrange, possibly through the standing committee, for a notice of the suspected need for a surrogate to be sent to the adult in charge of the child's place of residence and to the parents or guardians at their last known address.

3. The district should arrange for a review of the evidence to determine whether the parents or guardians are in fact unknown, unavailable, or the child is a ward of the state. These reviews may also be the responsibility of the standing committee. The determination should be completed within a reasonable time following receipt of the original request for a surrogate; and the finding of the reviewing body or officer should be sent to the district superintendent. If need for a surrogate is confirmed, the assignment should be made within five days.

4. A decision should be made as to the length of time a surrogate will serve as advocate for a child.

5. A system of communication should be established by the district to keep surrogates informed regarding the problems facing the children they serve.

6. A system of recourse should be established for surrogates in cases when problems cannot be resolved between surrogates and the school district. The system might involve resolution by the standing committee or an independent third party.

7. The school district shall maintain the right to relieve a surrogate of his or her duties at any time following a determination of the standing committee that the surrogate is not properly representing the child.

8. The child himself shall have the right to request a change in surrogates.

Implementation

After surrogate parent procedures are implemented, they should be carefully observed. Surrogate parents must be regarded as having the same rights and duties as court-appointed guardians ad litem. Surrogates must also be viewed by local educational agencies as parents to the children with the right to demand and implement due process.

APPENDIX C

Wyoming Public Records Act

W.S. 9-9-101. Definitions.

a. Definitions as used in this Act (Sections 9-9-101 to 9-9-105):

(i) "Public Records" when not other wise specified shall include any paper, correspondence, form, book, photograph, photostat, film, microfilm, sound recording, map drawing, or other document, regardless of physical form or characteristics, and including all copies thereof, that have been made by the State of Wyoming, counties, municipalities, and political subdivisions thereof, or received by them in connection with the transaction of public business, except those privileged or confidential by law;

(ii) Public records shall be classified as follows:

(A) "Official public records" shall include all original vouchers, receipts, and other documents necessary to isolate and prove the validity of every transaction relating to the receipt, use and disposition of all public property and public income from all sources whatsoever; all agreements and contracts to which the State of Wyoming or agency or subdivision thereof may be a party; all fidelity, surety and performance bonds; all claims filed against the State of Wyoming or any agency or subdivision thereof; all records or documents required by law to be filed with or kept by any agency or the State of Wyoming; and all other documents or records determined by the records committee to be official public records;

(B) "Office files and memoranda" shall include all records, correspondence, exhibits, books, booklets, drawings, maps, blank forms, or documents not above defined and classified as official public records; all duplicate copies of official public records filed with any agency of the State of Wyoming or subdivision thereof; all documents and reports made for the internal administration of the office to which they pertain but not required by law to be filed or kept with such agency; and all other documents or records, determined by the records committee to be office files and memoranda;

(iii) "Writings" means and includes all books, papers, maps, photographs, cards, tapes, recordings or other documentary materials, regardless of physical form or characteristics;

(iv) "Political subdivision" means and includes every county, city and county, city, incorporated and unincorporated town, school district within the state;

(v) "Official custodian" means and includes any officer or employee of the state or any agency, institution or political subdivisions thereof, who is responsible for the maintenance, care and keeping of public records, regardless of whether such records are in his actual personal custody and control;

(vi) "Custodian" means and includes the official custodian or any authorized person having personal custody and control of the public records in question;

(vii) "Person" means and includes any natural person, corporation, partnership, firm or association;

(viii) "Person in interest" means and includes the person who is the subject of a record or any representative designated by said person, except that if the subject of the record is under legal disability, the term "person in interest" shall mean and include the parent or duly appointed legal representative.

W.S. 9-9-102. Inspection; generally.

(a) All public records shall be open for inspection by any person at reasonable times, except as provided in this act (Sections 9-9-101 to 9-9-105) or as otherwise provided by law, but the official custodian of any public records may make such rules and regulations with reference to the inspection of such records as shall be reasonably necessary for the protection of such records and the prevention of unnecessary interference with the regular discharge of the duties of the custodian or his office.

(b) If the public records requested are not in the custody or control of the person to whom application is made, such person shall forthwith notify the applicant of this fact.

(c) If the public records requested are in the custody and control of the person to whom application is made but are in active use or in storage, and therefore not available at the time an applicant asks to examine them, the custodian shall forthwith notify the applicant of this fact.

W.S. 9-9-103. Same; grounds for denying right of inspection; statement of grounds for denial; order to show cause; order to restrict disclosure; hearing.

(a) The custodian of any public records shall allow any person the right of inspection of such records or any portion thereof except on one (1) or more of the following grounds or as provided in subsection (b) or (d) of this section:

(i) Such inspection would be contrary to any state statute;

(ii) Such inspection would be contrary to any federal statute or regulation issued thereunder having the force and effect of law; or

(iii) Such inspection is prohibited by rules promulgated by the supreme court, or by the order of any court of record.

(b) The custodian may deny the right of inspection of the following records, unless otherwise provided by law, on the ground that disclosure to the applicant would be contrary to the public interest;

(i) Records of investigations conducted by, or of intelligence information or security procedures of, any sheriff, county attorney, city attorney, the attorney general, police department or any investigatory files compiled for any other law enforcement or prosecution purposes;

(ii) Test questions, scoring keys and other examination data pertaining to administration of a licensing examination, examination for employment or academic examination; except that written promotional examinations and the scores or results thereof shall be available for inspection, but not copying or reproduction, by the person in interest after the conducting and grading of any such examination;

(iii) The specific details of bona fide research projects being conducted by a state institution;

(iv) The contents of real estate appraisals made for the state or a political subdivision thereof, relative to the acquisition of property or any interest in property for public use, until such time as title of the property or property interest has passed to the state or political subdivision, except that the contents of such appraisal shall be available to the owner of the property at any time and except as provided by Wyoming Statutes;

(v) Interagency or intraagency memorandums or letters which would not be available by law to a private party in litigation with the agency.

(c) If the right of inspection of any record falling within any of the classifications listed in this section is allowed to any officer or employee of any newspaper, radio station, television station or other person or agency in the business of public dissemination of news or current events, it may be allowed to all such news media.

(d) The custodian shall deny the right of inspection of the following records, unless otherwise provided by law:

(i) Medical, psychological, and sociological data on individual persons, exclusive of coroners' autopsy reports;

(ii) Adoption records or welfare records on individual persons;

(iii) Personnel files except that such files shall be available to the duly elected and appointed officials who supervise the work of the person in interest. Applications, performance ratings and scholastic achievement data shall be available only to the person in interest and to the duly elected and appointed officials who supervise his work;

(iv) Letters of reference;

(v) Trade secrets, privileged information and confidential commercial, financial, geological or geophysical data furnished by or obtained from any person;

(vi) Library, archives and museum material contributed by private persons, to the extent of any limitations placed thereon as conditions of such contributions;

(vii) Hospital records relating to medical administration, medical staff, personnel, medical care, and other medical information, whether on individual persons or groups, or whether of a general or specific classification;

(viii) School district records containing information relating to the biography, family, physiology, religion, academic achievement and physical or mental ability of any student except to the person in interest or to the officials duly elected and appointed to supervise him.

(e) If the custodian denies access to any public record, the applicant may request a written statement of the grounds for the denial, which statement shall cite the law or regulation under which access is denied, and it shall be furnished forthwith to the applicant.

(f) Any person denied the right to inspect any record covered by this act (Sections 9-9-101 to 9-9-105) may apply to the district court of the district wherein the record is found for any order directing the custodian of such record to show cause why he should not permit the inspection of such record.

(g) If, in the opinion of the official custodian of any public record, disclosure of the contents of said record would do substantial injury to the public interest, notwithstanding the fact that said record might otherwise be available to public inspection, he may apply to the district court of the district in which such record is located for an order permitting him to restrict such disclosure. After hearing, the court may issue such an order upon a finding that disclosure would cause substantial injury to the public interest. The person seeking permission to examine the record shall have notice of said hearing served upon him in the manner provided for service of process by the Wyoming Rules of Civil Procedure and shall have the right to appear and be heard.

W.S. 9-9-104. Copies, printouts or photographs; fees.

(a) In all cases in which a person has the right to inspect any public records he may request that he be furnished copies, printouts or photographs for a reasonable fee to be set by the official custodian. Where fees for certified copies or other copies, printouts or photographs of such record are specifically prescribed by law, such specific fees shall apply.

(b) If the custodian does not have the facilities for making copies, printouts or photographs of records which the applicant has the right to inspect, then the applicant shall be granted access to the records for the purpose of making copies, printouts or photographs. The copies, printouts or photographs shall be made while the records

are in the possession, custody and control of the custodian thereof and shall be subject to the supervision of such custodian. When practical, they shall be made in the place where the records are kept, but if it is impractical to do so, the custodian may allow arrangements to be made for this purpose. If other facilities are necessary the cost of providing them shall be paid by the person desiring a copy, printout or photograph of the records. The official custodian may establish a reasonable schedule of time for making copies, printouts or photographs and may charge a reasonable fee for the services rendered by him or his deputy in supervising the copying, printing out or photographing as he may charge for furnishing copies under this section.

W.S. 9-9-105. Penalty.

Any person who willfully and knowingly violates the provisions of this act (Sections 9-9-101 to 9-9-105) shall be guilty of a misdemeanor and upon conviction thereof, shall be punished by a fine not to exceed one hundred dollars ($100.00).

APPENDIX D

Rules and Regulations Governing Protection of the Confidentiality of Personally Identifiable Data, Information and Records that are Collected, Maintained or Used by Wyoming Educational Agencies

General Provisions

Section 1. Applicability. These rules and any amendments thereto shall govern the protection of the confidentiality of any personally identifiable data, information, and records collected, maintained or used by state and local educational agencies to determine whether children, ages birth to 21, are handicapped and are receiving appropriate special education and related services, and to assist agencies in providing special education and related services. These rules and regulations shall be complied with in conjunction with the policies and recommentations of the Office for Handicapped Children and the Wyoming State Board of Education.

Section 2. Definitions.

a. Consent means that:

(1) the parent has been fully informed of the information stated in Section 2 in the language in which he or she is most competent, unless it clearly is not feasible to do so,

(2) the parent understands and agrees in writing to the carrying out of the activity for which his or her consent is sought, and the consent sets forth that activity and lists the records (if any) which will be released and to whom, and

(3) the parent understands that the granting of consent is voluntary on the part of the parent.

b. Destruction means physical destruction or removal of personal identifiers from data so that the data is no longer personally identifiable.

c. Formal Evaluation means evaluation, interviewing or testing procedures used selectively with an individual child and does not include basic tests administered to or procedures used with all children in a school.

d. Parent means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent of any child on whom data is collected, maintained or used to determine whether the child is handicapped and is receiving appropriate special education and related services, or to assist participating agencies in providing such services.

e. Participating Agency means any agency, institution or individual which collects, maintains or uses data, or from which data is

obtained, to determine whether a child is handicapped and is receiving appropriate special education and related services, or to assist participating agencies in providing such services.

f. Personally Identifiable means that the data includes:

(1) the name of the child, the child's parent, or other family member,

(2) the address of the child,

(3) a personal identifier, such as the child's Social Security number or student number, or

(4) a list of personal characteristics or other information which would make it possible to identify the child with reasonable certainty.

Access Rights

Section 1. Inspection and Review. Each participating agency shall permit parents to inspect and review any personally identifiable data relating to their children which is collected, maintained or used by the agency for the purposes stated in Section 1, General Provisions. The agency shall comply with a request for inspection or review without unnecessary delay and prior to any hearing relating to the identification, assessment or placement of the child, and in no case more than 45 days after the request has been made.

a. The right to inspect and review educational records under this section includes:

(1) the right to a response from the participating agency to reasonable requests for explanations and interpretations of the data, and

(2) the right to request that the agency provide copies of the records containing the data where failure to provide those copies would effectively prevent the parent from exercising the right to inspection and review.

b. An agency may presume that the parent has authority to inspect and review data relating to his or her child unless the agency has been advised that the parent does not have authority under applicable state laws governing such matters as guardianship, separation and divorce.

Section 2. Record of Parties Obtaining Access to Data. Each participating agency shall keep a record of parties obtaining access to data collected, maintained or used under these rules. The record shall include the name of the party, the date access was given, and the purpose for which the party is authorized to use the data. If any record includes data on more than one child, parents shall have the right to inspect and review only the data relating to their specific child, or to be informed of that specific data.

Section 3. Listing of Data. Each participating agency shall provide to parents who request it, a list of the types and location of data collected, maintained or used by the agency, concerning their child.

Section 4. Fees. A participating agency may charge a reproduction fee, in accordance with the Wyoming Public Records Act (W.S. 9-9-101 through 9-9-105), but it may not charge a fee to search for, to retrieve, or to allow review of data.

HEARING RIGHTS

Section 1. Request for Amendment of Record. A parent who believes that data collected, maintained or used by a participating agency for the purposes stated in Section 1, General Provisions, is inaccurate, misleading or in violation of the privacy or other rights of the child, may request the participating agency to make appropriate amendments to the data. The agency shall decide whether to amend the data in accordance with the request within a reasonable period of time of receipt of the request.

Section 2. Right to a Hearing. If the agency refuses to amend the data in accordance with the request, it shall inform the parent of the refusal and advise the parent of the right to a hearing on the matter.

a. The agency shall, on request, provide an opportunity for a hearing in order to challenge data to ensure that it is not inaccurate, misleading or otherwise in violation of the privacy or other rights of the child. The hearing shall be conducted in accordance with the Wyoming Administrative Procedure Act, W.S. 9-4-101 through 9-4-115.

b. The hearing shall be chaired by a person who does not have a direct interest in the outcome of the hearing.

Section 3. Amendments and Dissenting Opinions.

a. If, as a result of the hearing, the agency decides that the data is inaccurate, misleading or otherwise in violation of other rights of the child, it shall amend the data accordingly and so inform the parent in writing.

b. If, as a result of the hearing, the agency decides that the data is not inaccurate, misleading or otherwise in violation of the privacy or other rights of the child, it shall inform the parent of the right to place in the records a statement commenting on the data and setting forth any reasons for disagreeing with the decision of the agency.

c. Any explanation placed in the records of the child as a consequence of parental disagreement with the agency shall:

(1) be maintained by the agency as part of the records of the child as long as the record or contested portion thereof is maintained by the agency; and

(2) if the records of the child or the contested portion thereof is disclosed by the agency to any party, the parental explanation shall also be disclosed to that party.

CONSENT

Section 1. Disclosure Constraints

a. Written parental consent is required before data are:

(1) disclosed to anyone other than officials of participating agencies collecting, maintaining or using the date for purposes delineated in Section 1, General Provisions, except as provided in this section,

(2) used for any purpose other than those stated in Section 1, General Provisions, or

(3) sought directly from the child by formal evaluation.

b. An educational agency or institution subject to the Family Educational Rights and Privacy Act of 1974 may not release data from educational records to participating agencies without parental consent except as provided in Section 438(b) of that Act.

Section 1. Appeal of Refusal of Parent to Provide Consent. In the event a parent refuses to provide consent for disclosure of personally identifiable data regarding the child, the participating agency, with just cause, may request a hearing to obtain parental consent. The hearing shall be conducted in accordance with the Wyoming Administrative Procedure Act, W.S. 9-4-101 through 9-4-115, and shall be chaired by a person who does not have a direct interest in the outcome of the hearing.

SAFEGUARDS

Section 1. Protection of Confidentiality of Data at Agency Level. Each participating agency shall protect the confidentiality of data at collection, storage, disclosure and destruction stages and provide to the Office for Handicapped Children a procedure which will assure that the personally identifiable data will be maintained in a confidential manner. This procedure shall include the following and such other procedures as hereafter may be prescribed by the Wyoming State Board of Education.

a. One person in each participating agency shall be designated as responsible for assuring the confidentiality of any personally identifiable data.

b. Each participating agency shall be responsible for assuring that all persons employed by the agency who collect or use the personally identifiable data receive appropriate instruction or training in these rules, the Family Educational Rights and Privacy Act, the Wyoming Public Records Act and other applicable Wyoming statutes and rules and regula-

tions. This instruction shall be directed to understanding the rights of the child and parents, the confidential nature of the data, and access and dissemination procedures.

c. Each participating agency shall maintain, for public inspection, a current listing of the names of those employees within the agency who may have access to the personally identifiable data.

DESTRUCTION OF DATA

Section 1. Destruction of Records After No Longer Needed.

a. The participating agency shall inform parents when personally identifiable information collected, maintained, or used under this part is no longer needed to provide educational services to the child.

b. When the information is no longer needed the participating agency must destroy the information at the request of the parents; however, a permanent record of a student's name, address, and phone number, his or her grades, attendance record, classes attended, grade level completed, and year completed may be maintained without time limitation.

CHILDREN'S RIGHTS

Section 1. Passage of Privacy Rights to Children. On reaching the age of 19, the rights of privacy accorded to parents shall pass to the child except in the case of a child who has been declared legally incompetent to make such decisions for himself, and for whom legal guardianship is required beyond the age of 19. In such instances, the child's legal guardian shall maintain the rights to privacy as stated in these rules.

ENFORCEMENT

Section 1. Violation by Individuals. To the extent that the Wyoming Public Records Act is applicable to the provisions set forth in these rules and regulations, persons who willfully and knowingly violate such provisions shall be punished by a fine not to exceed one hundred dollars ($100), pursuant to W.S. 9-9-105.

Section 2. Violation by Educational Agencies. Wyoming educational agencies failing to comply with the provisions set forth in these rules and regulations may be subject to the withholding of state funds and/or the withholding of school accreditation by the Wyoming State Board of Education, pursuant to W.S. 21-2-304(a)(ii).

APPENDIX E

Definitions

Appropriate Educational Services means the educational services recommended for a handicapped child as a consequence of multidisciplinary assessment conducted by personnel properly certified and endorsed and/or licensed to render assessment services and supported by a Child Study Committee of the district in which the child is a resident.

Handicapped Child means a child or youth who, as a consequence of an individual assessment conducted by a multidisciplinary team comprised of properly certified and endorsed and/or licensed personnel, is identified as having a mental, physical, or psychological handicap or social maladjustment which impairs learning.

Hearing Impairment means:

1. deafness wherein residual hearing is not sufficient for understanding spoken word and to develop language, resulting in deprivation in learning and communication, or

2. hard of hearing wherein a hearing loss which prevents full awareness of environmental sounds and spoken language, limiting normal language acquisition and educational achievement.

Mental Retardation means significantly below-average general intellectual functioning which exists concurrently with deficits in adaptive behavior and is manifested during the developmental period of life. (Adaptive behavior is the effectiveness or degree to which the individual meets the standards of personal independence and social responsibility expected of his age and cultural group. The retardation may be mild, moderate, severe or profound.)

Multihandicap means two or more major handicaps (i.e., mental retardation, hard of hearing, orthopedic, behavior disorder) which result in such severe educational problems that extraordinary programs and services are necessary to meet the individual's educational needs.

Orthopedic Impairment means congenital or acquired impairments to the orthopedic system--bone, joint or muscle--to the degree that the school facilities or equipment require special adaptation and modification, or the individual requires a special instructional program or other special services.

Other Health Impairment means prolonged health impairment, either permanent or impermanent, which significantly interferes with learning and requires a special instructional program or service or requires adaptation of the school facilities.

Parent means a parent, a guardian, a person acting as a parent of a child, or a surrogate parent who has been appointed in accordance with Chapter XI, Section 5, subsection f, of these regulations.

Related Educational Services means services above and beyond the typical services necessary to help a handicapped child benefit from special and/or regular education either within or outside of the school district, including tuition, transportation, room and board, itinerant instruction, and such developmental, corrective, and supportive services as speech therapy, audiology, educational and psychological assessment, physical and occupational therapy, social case work, psychological counseling, language interpretation, homebound and hospital instruction and technical assistance for school district personnel in the education of handicapped children.

Social/Emotional Handicap means manifestation of one or more of the following characteristics to a marked degree over an extended period of time:

1. difficulties in learning that cannot be explained by intellectual, sensory or health factors;

2. difficulties in building or maintaining satisfactory interpersonal relationships with peers, parents and teachers;

3. a general pervasive mood of unhappiness, depression or hypersensitivity;

4. a tendency to develop physical symptoms, pains or fears associated with personal or school problems;

5. inappropriate behavior or feelings under normal circumstances.

Specific Learning Disability means a disorder in one or more of the basic psychological processes involved in understanding or in using language, spoken or written, which may manifest itself in an imperfect ability to listen, think, speak, read, write, spell, or to do mathematical calculations. The term includes such conditions as perceptual handicaps, brain injury, minimal brain disfunction, dyslexia, and developmental aphasia. The term does not include children who have learning problems which are primarily the result of visual, hearing, or motor handicaps; of mental retardation of emotional disturbance, or of environmental, cultural, or economic disadvantage.

Speech and Language Handicap means speech or language that deviates so much from that of other people that it calls attention to itself, interferes with communication, or causes its possessor to be maladjusted.

Visual Handicap means:

1. partial vision wherein after correction, vision, although impaired, remains a primary channel of learning and with adjustments, the visual tasks required in the usual school situation can be performed;

2. blindness wherein after correction, there is no vision or little potential for using vision as a primary channel for learning and, consequently, reliance must be made upon tactual and auditory senses to obtain information.

APPENDIX D

WYOMING SELECTED STATUTES PERTAINING TO EDUCATION OF THE HANDICAPPED, 1969

SELECTED STATUTES FROM THE WYOMING EDUCATION CODE OF 1969 AS AMENDED PERTAINING TO THE EDUCATION OF HANDICAPPED CHILDREN

Right to Attend School

21-4-301. Schools to be free and accessible to all children; minimum school year. Except as otherwise provided by law, the public schools of each school district in the state shall at all times be equally free and accessible to all children resident therein over six (6) years of age and under the age of twenty-one (21), subject to such regulations as the board of trustees may prescribe. Each school district shall operate its schools and its classes for a minimum of one hundred seventy-five (175) days each school year.

21-4-302. Age for registration in first grade and kindergarten.

(a) A pupil may register in the first grade in the public schools of this state in the year in which his sixth birthday falls on or before September 15.

(b) A pupil may register in kindergarten in the public schools of this state in the year in which his fifth birthday falls on or before September 15.

21-4-303. Right not denied on account of sex, race or religion. No child shall be denied the right to attend the public schools of this state on account of sex, race, or religion.

Education Mandate

21-14-101. Handicapped children entitled to free and appropriate education. Each and every child of school age in the state of Wyoming having a mental, physical or psychological handicap or social maladjustment which impairs learning, shall be entitled to and shall receive a free and appropriate education in accordance with his capabilities.

21-14-102. General supervision and responsibility for education; rules and regulations of state board. The state board, jointly with the board of trustees of each school district shall have general supervision and responsibility for the education of all children in the state with such handicaps, and the state board shall adopt reasonable rules and regulations to assure that each child receives a free and appropriate education in accordance with his capabilities.

21-14-103. Duties of school districts; interdistrict contracts; assistance of state board. Each school district of this state having any school age children residing in the district who possess any of the handicaps covered under this chapter (W.S. 21-14-101 to 21-14-106), shall, subject to the rules and regulations of the state board, provide for the appropriate diagnosis, evaluation, education or training, and necessary related services, and may include, but is not limited to room and board, for such children. Any school district having any such resi-

dent children and not able to provide the necessary and appropriate programs and services, shall contract with another school district or agency to obtain them. If the programs and services cannot reasonably be provided by the district or by interdistrict contracts, it shall be the responsibility of the state board to assist local boards of trustees in arranging for the appropriate educational programs and services either within or without the state pursuant to the rules and regulations of the state board. Such programs and services shall be financed as provided by law.

Allocation of Classroom Units

21-13-308(h)

In allotting classroom units for exceptional or handicapped children, there shall be allotted one (1) full unit, or proportional fraction thereof, for each ten (10) pupils identified as educable retarded, and for pupils also evaluated or diagnosed as having physical, psychological, or social disabilities which impair learning; and one (1) full unit, or proportional fraction thereof, for each eight (8) pupils identified as trainable retarded; provided a properly certificated teacher qualified to teach pupils having the disabilities included in this article (W.S. 21-13-301 to 21-13-313) is employed in each allocated classroom unit, and such pupils are not otherwise included in any other classroom unit determination.

Allocation of Support Services

21-13-309(e)

The amount included in the foundation program of a district for education of children who have a mental, physical or psychological handicap or social maladjustment which impairs learning is the amount spent in the current fiscal year for education diagnosis and evaluation of all such children, the amount spent in the current fiscal year for tuition and maintenance of such children who attend school in another district or state, and the amount spent for such education within the district during the current school year, under regulations established by the state board. No reimbursement shall duplicate any other category.

21-14-104. Wyoming school for the deaf; maintenance and operation. The state board of education shall maintain and operate the school for the education of the deaf in Casper, Natrona county, known as the Wyoming school for the deaf.

21-14-105. Same; powers and duties of state board. The state board shall operate the Wyoming school for the deaf from such funds as may now or hereafter be appropriated for that purpose, and the board shall provide adequate staff, equipment, and supplies for the proper operation of such school. The state board may promulgate such rules and regulations as it deems necessary and may accept gifts or grants in aid from any person whomsoever.

21-14-106. General supervision, educational and other services for deaf, blind and persons with reading disabilities.

(a) The state board shall have the general supervision of the deaf and blind and all other persons with a physical disability which prevents reading in the normal manner who are residents of this state; and, insofar as funds are made available, said board shall provide or cause to be provided such educational and other services as it deems necessary to help such persons to help themselves to become and remain useful citizens of the community.

(b) In addition the state board may hire such personnel and purchase such books, equipment, and supplies as it seems necessary to accomplish the purpose of subsection (a) of this section.

Boards of Cooperative Educational Services

21.20-101. Citation. This act (W.S. 21-20-101 to 21-20-109) may be cited as "The Boards of Cooperative Educational Services Act".

21-20-102. Purpose. This act (W.S. 21-20-101 to 21-20-108) is passed to provide a method whereby school districts and community college districts or any combination may work together and cooperate to provide educational services, including but not limited to vocational-technical education, adult education and services for exceptional children, when the services can be more effectively provided through a cooperative effort.

21-20-103. "Board of trustees" defined. As used in W.S. 21-20-101 through 21-20-108 "board of trustees" means the board of trustees of any school district within the state or the community college district board of any community college within the state.

21-20-104. Board of cooperative educational services; generally.

(a) Whenever two (2) or more boards of trustees desire to establish a board of cooperative services for the purpose of providing cooperative educational services and when the services can be provided more effectively through a cooperative effort, the president of two (2) or more boards of trustees may call a meeting of the interested boards. At the meeting, the boards of trustees, a majority of whose members respectively vote in favor of doing so, may enter into an agreement to form a board of cooperative services. The agreement shall specify among other things, the length of term of the agreement, the rights, responsibilities, and obligations of each participating district, the types of services to be rendered, the procedure for the establishment of additional services, and the procedure for the inclusion of additional districts within the cooperative educational services program. The agreement shall also provide a method for the amendment and dissolution of the agreement with the consent of each participating district. All agreements entered into between the participating districts shall be submitted to the state board of education for approval.

(b) The presidents of the boards of trustees agreeing to participate in the board of cooperative educational services shall agree upon and set a time and place of meeting of the members of the participating boards of trustees for the purpose of electing members of the board of cooperative educational services. At the meeting, the participating boards of trustees may elect by secret ballot from among the members of the boards so assembled a board of cooperative educational services to be composed of not less than five (5) nor more than nine (9) members unless there are more than nine (9) districts participating in which event each participating district shall have one (1) member. Each participating board of trustees, regardless of its number of members is entitled to cast five (5) votes in the selection of each of the members of the board of cooperative educational services. Each board of trustees party to the agreement shall have at least one (1) member on the board of cooperative educational services. The terms of office of each of the members of the board of cooperative educational services shall be coterminous with their respective terms of office upon their boards of trustees. As the terms of office expire, or as vacancies occur, new members of the board of cooperative educational services shall be elected by the members of the participating boards of trustees at a joint meeting called for that purpose.

21-20-105. Same; chairman, vice-chairman, clerk and treasurer; meetings. At its first meeting, the members of the board of cooperative educational services elected as set forth in W.S. 20-20-104 (b) shall proceed to elect from their membership a chairman, a vice chairman, a clerk, and a treasurer, whose terms of office shall be for one (1) year unless their terms of office as school board members expire earlier. The duties of the chairman, vice-chairman, clerk and treasurer of the board of cooperative educational services shall be the same as the duties provided by law for similar offices of boards of trustees of school districts within this state insofar as they are applicable. Meetings of the board of cooperative educational services shall be called, held and conducted as provided by law for the meeting of the boards of trustees of school districts within this state.

21-20-106. Cost of facilities, equipment and services. The costs of facilities, equipment and services performed under the direction of the board of cooperative educational services shall be financed by participating districts on a basis agreed upon by the boards of trustees of the participating districts.

21-20-107. Powers and duties of board of cooperative educational services.

(a) Each board of trustees of cooperative educational services shall:

(i) Prescribe and enforce rules, regulations and policies for its own government and for the government of the services and affairs under its jurisdiction which are consistent with the laws of the state;

(ii) Keep minutes of all meetings at which official action is taken and a record of all official acts which are public records;

(iii) Be responsible for such programs and services as shall be provided by joint agreement of the boards of trustees involved in the cooperative educational programs;

(iv) Administer and abide by the terms of the agreement or agreements entered into by the participating districts.

21-20-108. Same; property; contracts; gifts, etc.; employment and discharge of personnel; expenses.

(a) Each board of trustees of cooperative educational services may:

(i) Hold, convey, lease, rent, and manage property;

(ii) Contract for educational and related services with any other agency;

(iii) Accept or reject any federal or other gift, grant, bequest, or devise;

(iv) Discharge any employee;

(v) Employ any personnel needed to perform the services for which the board of cooperative services is formed;

(vi) Receive and expend money and provide for the necessary expenses of the board incurred in the exercise of its powers and performance of its duties.

21-20-109. Special school district tax for board of cooperative educational services; election not required.

(a) For the purpose of maintaining programs offered by a board of cooperative educational services, the school districts comprising the board may levy a special school district tax not to exceed one-half (1/2) mill on the taxable valuation of the member districts:

(i) The tax shall be in addition to the tax limitations expressed in W.S. 21-13-101;

(ii) The vote of the electors within the member districts shall not be required for the tax levy; and

(iii) All revenues derived from the levy shall be distributed to the board of cooperative educational services.

(b) The amount of the mill levy shall be determined on the basis of a predetermined formula, based upon a participating district's total enrollment, such formula to be ascertained by the board of cooperative

services and ratified by at least three-fourths (3/4) of the participating boards. The assessment shall raise only the necessary funds to meet the financial requirements of programs and services offered. The revenue raised by this assessment will be deducted from the total operating cost when assessing participating districts' tuition and maintenance.

(c) One (1) year of advance notice shall be given by any participating board of trustees before withdrawing from the funding of the cooperative educational services.

APPENDIX E

WRITING THE DECISION

WRITING THE DECISION

Decision writing is a unique, specific, and difficult task for most non-lawyers. The language of the law is frequently unfamiliar and the use of litigation that has come down from the courts in helping establish precedent is based on specific (individual) cases and may or may not parallel the specific case of concern to the hearing officer. Precedent in the law is established through landmark cases such as PARC,[1] Mills,[2] and Lebank v. Spears.[3] These cases were class action matters and involved categories of handicapped children and hinged on constitutional as well as statutory rights. Other cases involving a single individual have lesser impact in establishing precedent in the law.

Cases involving a single individual hinge on the specific facts that may be unique to that particular case and, therefore, should be used with caution when applying the case to one before the due process hearing tribunal. In nearly every instance inductive reasoning (reasoning that depends upon thinking from the specific to the general) is required when applying an individual case to broader legal issues.

One technique that may prove helpful to the due process hearing officer is to look at similar cases and chart the fact of each case together with the facts of the case to be decided. The chart could look something like the one below.

	Case A	Case B	Case C	Case D
FACTS: (based on obvious and expert testimony)	Age of child	Age of child	etc.	My case: Age of child
	Handicapping condition	Handicapping condition	etc.	Handicapping condition
	Evaluation	Evaluation	etc.	Evaluation/Nondiscriminatory
	Placement	Placement	etc.	Appropriate placement
	Expert testimony	Expert testimony	etc.	Facts established by the obvious, stipulation, and/or expert testimony.

When cases can be grouped to provide many similarities, a generalization may be drawn. This is the usual method of building a body of case law from highly individualized cases containing unique facts. The model suggested above will, of course, have many different entries in each column. There may also be many similarities. This is the point at which judiciary descretion (hearing officer) judgment and skill are required. Remember, there is no substitute for common sense. In the Willowbrook deinstitutionalization decision, the court failed to consider that children with highly contagious hepatitis B were to be placed in an environment with many other children who were susceptible if exposed to the disease. As a result, many of the children from the Willowbrook School were necessarily returned to a residential environment where they could be treated and other children would not be exposed to the disease. While this is an unusual circumstance, the hearing officer is well advised to become as familiar with as many of the facts in a particular case as possible before making his/her decision. Hearing officers will not be called upon to make decisions and issue orders in class action matters. Their decisions may, however, carry considerable weight with residents within a school district and/or broader community, e.g., the deaf community, the associations for the mentally retarded, etc.

In writing your decisions, remember to write to the point. Write in good, clear English. Don't overwrite! One of the most frequent mistakes among those who are not completely familiar with a specific discipline (the law) is to overwrite. Be precise, be clear, be brief.

See Appendix G-2 for some examples of decisions written by experienced hearing officers.

APPENDIX F

ENTITLEMENTS UNDER SECTION 309(e)

OF THE WYOMING EDUCATION CODE

WYOMING STATE BOARD OF EDUCATION
RULES AND REGULATIONS GOVERNING ENTITLEMENTS UNDER SECTION 309(e) OF THE WYOMING EDUCATION CODE

WYOMING STATE DEPARTMENT OF EDUCATION
LYNN O. SIMONS
STATE SUPERINTENDENT OF PUBLIC INSTRUCTION

March 2, 1981

STATE BOARD OF EDUCATION
State of Wyoming

I certify that the copy hereto attached is a true copy of the Wyoming State Board of Education Rules and Regulations Governing Entitlements Under Section 309(e) of the Wyoming Education Code and is in accordance with the Wyoming Administrative Procedure Act (W.S. 9-4-101 through 9-4-115), W.S. 21-14-102, and that the original Rules are on file with the State Superintendent of Public Instruction. These Rules supersede all other Rules previously filed dealing with this subject.

Prior to adoption, these Rules were made available for public inspection on July 10, 1980, and a notice of intended adoption was sent to the Office of the Attorney General and the Legislative Service Office.

The Rules have been approved by the Governor as indicated below.

The attached Rules are effective immediately upon filing below.

Signed this 25th day of August, 1980.

STATE OF WYOMING } SS
Office of the Secretary

Filed the 2ND day of MARCH
19 81 at 10:45 A.M.
THYRA THOMSON
Secretary of State
Secretary of State
Filing Stamp

RECEIVED
MAR 2 1981
Secretary of State
Wyoming

Donald Blakeslee
Donald Blakeslee, Chairman
State Board of Education

Ed Herschler
Reviewed and Approved by
the Governor

F-2

MAR 2 1981

TABLE OF CONTENTS

CHAPTER V

GENERAL PROVISIONS

Section No.	Subject	Page No.
1	Authority	98
2	Applicability	98
3	Promulgation, Amendment or Repeal of Rules	98
4	Definitions	98

CHAPTER VI

REIMBURSEMENT

Section No.	Subject	Page No.
1	Qualification	100
2	Reimbursable Salaries Under Section 309(e)	101
3	Educational Resource Centers	102
4	Travel Expenses	104
5	Tuition, Room and Board and Transportation Costs	104
6	Contractual Services with Other Organizations and Individuals	105
7	Program Evaluation and/or Evaluation Consultation	105a
8	Non-Expendable Instructional Materials and Equipment	105a
9	Related Educational Services	105b
10	Services Authorized During the Summer Months	105b

CHAPTER VII

APPROVAL

Section No.	Subject	Page No.
1	Application and Reporting	105c
2	Appeal to State Superintendent	105d
3	Effective Date	105d

WYOMING STATE BOARD OF EDUCATION
RULES AND REGULATIONS GOVERNING ENTITLEMENTS
UNDER SECTION 309(e) OF THE
WYOMING EDUCATION CODE

CHAPTER V

GENERAL PROVISIONS

Section 1. Authority. These rules governing the disbursement of Foundation Program funds for handicapped children are adopted as authorized by the Wyoming Administrative Procedure Act, Chapter 108, Session Laws of Wyoming 1965 (W.S. 9-4-101 through 9-4-115) and Sections 228(i), 232(e), and 285, Chapter 111, Session Laws of Wyoming 1969 (W.S. 21-13-309(e), 21-13-305(i), and 21-14-102). As used in these rules Section 308(h) refers to W.S. 21-13-308(h) and Section 309(e) refers to W.S. 21-13-309(e).

Section 2. Applicability. These rules and any amendments thereto shall govern all applications made by school districts for reim bursement for the education of handicapped children as authorized by Section 232(e), Chapter 111, Session Laws of Wyoming 1969 (W.S. 21-13-309(e)), for expenditures during the school year 1969-1970 and thereafter, and shall supersede all rules, regulations, guidelines and memoranda previously promulgated through the State Board of Education. These rules and regulations shall be considered and complied with in conjunction with the policies and recommendations of the Office for Handicapped Children.

Section 3. Promulgation, Amendment or Repeal of Rules. Any amendments to these rules shall be effected as provided by Chapter 108, Session Laws of Wyoming 1965 (W.S. 9-4-101 through 9-4-115).

Section 4. Definitions. As used in these rules:

a. "Agency" shall mean any accredited or appropriately licensed public or private organization or religious institution that offers special education and/or related services for handicapped children.

b. "Audiologist," "educational diagnostician," "educational resource specialist," "educational resource center facilitator," "occupational therapist," "physical therapist," "psychological technician," "school psychologist," "school social worker," and "speech/hearing therapist" shall mean persons who are either properly certified by the State Department of Education or are properly licensed to perform such services.

c. "Department of Education" shall mean the Wyoming State Department of Education.

d. "Educational resource center" shall mean an organization comprised of properly certified personnel having education, experience and expertise in resources that are needed to educate handicapped children and whose primary function is to provide technical assistance to teachers in identifying, selecting, procuring and using such resources. The staff of an educational resource center shall consist of a facilitator, educational resource specialist and a secretary/materials clerk.

e. "Enrollment in a 309(e) instructional program" shall mean a minimal enrollment of 10 handicapped children in direct instructional activities. In extreme and unusual circumstances an exception may be authorized by prior written approval of the State Superintendent of Public Instruction.

f. "Handicapped child" shall mean a child or youth who, as a consequence of an individual assessment conducted by a multidisciplinary diagnostic team comprised of properly certified and endorsed and/or licensed personnel, is identified as having a mental, physical or psychological handicap or social maladjustment which impairs learning.

g. "Hearing screening technician" shall mean a person who, after receiving appropriate inservice education in hearing screening, assists a certified school district audiologist in screening the hearing of children.

h. "Language interpretation" shall mean the interpretation of language (1) for deaf children, (2) during assessment and instruction of handicapped children as defined in these rules and, (3) when the use of an interpreter is necessary to communicate with parents of handicapped children.

i. "Non-expendable instructional materials and equipment" shall refer to items having a useful economic life longer than one year and that are used in programs for diagnosing, evaluating or instructing handicapped children. (Furniture is not reimbursable.)

j. "Office for Handicapped Children" shall mean the Office for Handicapped Children of the State Department of Education.

k. "Properly certified" shall mean persons who, at the time of employment by the district, possess or are eligible to receive a valid certificate from the State Department of Education. A person newly employed by a school district shall be certified within 30 working days after the first day of active employment.

A person whose certification has expired shall be recertified within 30 working days after expiration of the certification.

l. "Related educational services" shall mean services above and beyond the typical services necessary to help a handicapped child benefit from special and/or regular education either within or outside of the school district, including tuition, transportation, room and board, itinerant instruction, and such developmental, corrective, and supportive services as speech therapy and audiology, educational and psychological assessment, physical and occupational therapy, social case work, psychological counseling, language interpretation, homebound and hospital instruction and technical assistance for school district personnel in the education of handicapped children.

m. "School district" shall mean a public school entity as recognized by Wyoming statutes.

n. "School year" shall mean a period of 180 calendar days that coincide with the time that school is ordinarily in session.

o. "State Board" shall mean the Wyoming State Board of Education as that body is defined by Section 11(a), Chapter 111, Session Laws of Wyoming 1969 (W.S. 21-2-301).

p. "309(e) teacher" shall mean a person properly certified to perform the duties for which the teacher is hired who works with handicapped children and staff in more than one school and/or more than one district or a properly certified teacher who provides direct instruction to handicapped children authorized by prior written approval of the State Superintendent of Public Instruction.

q. "Teacher aide" shall mean a person who, under the personal and continuous supervision of a properly certified special education teacher as defined herein, assists in approved programs for handicapped children approved by the State Department of Education.

CHAPTER VI

REIMBURSEMENT

Section 1. Qualification. Reimbursements for which a district may qualify under Section 232(e), Chapter 111, Session Laws of Wyoming 1969 (W.S. 21-13-309(e)) and these rules and regulations shall be taken into account in the computations required by Section 234, Chapter 111, Session Laws of Wyoming 1969 (W.S. 21-13-311(a)), and will affect the district's total Foundation Program entitlement accordingly.

Section 2. Reimbursable Salaries Under Section 309(e).

a. To the extent that such persons work directly with handicapped children or their teachers in eligible services under Section 309(e), or in a situation governed and reimbursed by the terms of W.S. 21-13-308(h) and related provisions, a district applying for its School Foundation Program entitlement may claim the gross salaries and employee benefits of persons employed by the district during the current year, subject to the other subsections of this section.

b. Salaries paid to 309(e) teachers, audiologists, educational diagnosticians, educational resource specialists, facilitators of educational resource centers, physical therapists, occupational therapists, psychological technicians, school psychologists, school social workers and speech/hearing therapists as defined in these rules will be reimbursed under Section 309(e), subject to the subsections of this section.

c. In extreme and unusual circumstances the salary of a teacher of handicapped children may be reimbursed under Section 309(e). Such reimbursement, however, must be authorized by prior written approval of the State Superindendent of Public Instruction or the Superintendent's designee. Approval shall apply only to the school year in which it is granted but may be renewed using the procedure specified in this subsection. (All other classroom teachers of handicapped children who are reimbursed under the School Foundation Program, including teachers who must travel to more than one school or community to provide instruction, must be reimbursed under Section 308(h).)

d. Reimbursement of salaries for personnel identified in subsection b shall bear the same ratio to their total contracted salaries as the time spent in performance of eligible services under Section 309(e) and the number of children served.

e. Reimbursement also will be allowed for the salary of a teacher aide in an authorized 308(h) classroom unit in which there are enrolled 13 or more pupils identified as educable mentally retarded or who have a mental, physical, psychological, or social handicap that impairs learning as defined in the State Board of Education Rules and Regulations Governing Programs and Services for Handicapped Children in Wyoming School Districts. Reimbursement will also be allowed for a teacher aide employed in an approved 308(h) classroom unit enrolling 10 or more children classified as trainable mentally retarded and for a teacher aide in a 309(e) program whose employment received the prior written approval of the State Superintendent of Public Instruction or

the Superintendent's designee. To the extent that classroom units enroll fewer pupils than the enrollments stated above, but more than the unit enrollments stated in W.S. 21-13-308(h), reimbursement of the teacher aide's salary shall be prorated in a ratio equal to the fractional part of the enrollments which exceed those stated in W.S. 21-13-308(h). Teacher aides must perform their duties under the personal and continuous supervision of properly certified special education teachers. Teacher aides may supplement and complement the work of teachers but shall not function as teachers.

f. Reimbursement will be allowed for the salary of a hearing screening technician who works under the personal and continuous supervision of a properly certified audiologist who is a staff member of the district which claims reimbursement under this subsection. No more than one technician per audiologist may be reimbursed. Reimbursement of the salary for the technician shall bear the same ratio to the technician's total contracted salary as the time spent in performance of hearing screening services.

g. In the case of 309(e) personnel employed by two or more districts, each district shall be reimbursed on the basis of the fractional part of the salary paid by the district in accordance with subsection d of this section.

h. In the case of 309(e) personnel employed by one district which contracts with other districts for the performance of services by the 309(e) personnel for those districts, the employing district must deduct from the reimbursement that it is otherwise entitled to receive, amounts received from the district(s) pursuant to contract.

Section 3. Educational Resource Centers.

a. A school district with an enrollment of 2,500 pupils, or a district serving as the administrative and/or fiscal agent of a consortium of school districts with enrollments totaling 2,500 pupils, may be eligible for an educational resource center authorized by the Office for Handicapped Children. When circumstances warrant, and an appropriate petition is submitted, the State Superintendent of Public Instruction may authorize establishment of an educational resource center in a district in which less than 2,500 pupils are enrolled.

b. Reimbursement may be allowed for the salary of a facilitator, educational resource specialist and a secretary/materials clerk of an authorized educational resource center. After September 30, 1981, all authorized educational resource centers must be staffed with each of these positions.

c. A district operating an approved educational resource center may be reimbursed up to $600 annually per each professional staff member employed under 309(e) for purchase of non-expendable instructional materials and equipment to educate handicapped children in regular and special instructional programs, subject to the subsections of this section. A district which claims reimbursement under this subsection may not also claim reimbursement under Section 8, subsection a, of this Chapter.

d. All non-expendable instructional materials and equipment purchased by school districts under the provisions of subsection c of this section shall be appropriately catalogued and disseminated by the educational resource center.

e. A school district which directly operates an educational resource center may claim reimbursement for staff members of the center to travel within the State of Wyoming to provide technical assistance and other services needed and specifically requested by another school district to improve its services for handicapped children. Reimbursement for these services shall not exceed $700 during any fiscal year for a district which operates an educational resource center, and shall be subject to the travel policies prescribed for state employees.

f. A school district that contracts with a school district or a board of cooperative educational services that operates an authorized educational resource center for the use of instructional materials, consultation in their use and/or consultation concerning curricula and instructional procedures in the education of handicapped children, may claim reimbursement for the purchase of non-expendable instructional materials and equipment subject to the following: (1) the services must be delivered directly and regularly to teachers of the district by the educational resource specialist and/or the facilitator of the educational resource center; (2) district reimbursement shall not exceed $600 annually per each of the staff positions authorized under the terms of this subsection.

g. School districts that contract educational resource center services from boards of cooperative educational services or other school districts shall have ownership of all non-expendable instructional materials and equipment purchased under subsection f of this section. Such

districts shall reasonably plan and cooperate with the board of cooperative educational services or school district in the purchase, use, dissemination and evaluation of non-expendable instructional materials and equipment.

h. All non-expendable instructional materials and equipment purchased by school districts under the provisions of subsection f of this section shall be appropriately catalogued. Dissemination procedures shall be agreed to by the contracting parties.

i. School district contracts with boards of cooperative educational services and other school districts which require prior approval of the Office for Handicapped Children shall not include teacher aides funded under Chapter VI, Section 2, subsection e of these rules.

Section 4. Travel Expenses. Personnel, as defined in Chapter VI, Section 2, subsection b of these rules, who must travel within the district to render services to handicapped children shall be reimbursed for travel expenses. When personal vehicles are used, reimbursement shall be made at the rate established by local board policy, not to exceed the rate established by state law. No mileage reimbursement shall be authorized for use of school district vehicles.

Section 5. Tuition, Room and Board and Transportation Costs.

a. Necessary costs incurred by the school district for tuition, room and board, transportation and other allowable maintenance services for handicapped children who attend school in another district or state, or who attend a school operated by a non-public school located within the boundaries of the referring school district, shall be reimbursed in accordance with the terms of W.S. 21-13-309(e). Placement of handicapped children in educational facilities outside their district, however, shall receive the prior written approval of an individual pupil's Child Study Committee (as defined by the Wyoming State Board of Education Rules and Regulations Governing Programs and Services for Handicapped Children in Wyoming School Districts, Chapter XI, Section 9) operated by the district. Approval by a Child Study Committee shall not apply to out-of-district placement made by court order.

b. When it is necessary for a school district to have a child evaluated or placed outside the district in order to provide appropriate education for the child, the school district shall pay the cost of the evaluation and any necessary travel, food and lodging incurred by the child's parents, guardian or surrogate parents that is directly related to the child's evaluation or placement. Such expenditures shall be documented by original vendor receipts.

c. All services rendered under this section shall be contracted on forms approved by the Department of Education.

Section 6. Contracted Services with Other Organizations and Individuals.

When, in the best interest of a handicapped child, the district contracts educational services with another school district, a public, private or religious institution, or individual, inside or outside the State of Wyoming, reimbursement will be made for the amount expended during the current school year, subject to the following subsections.

a. All individuals and organizations with whom services are contracted shall comply with public school district and State Board of Education standards, including, where applicable, certification and licensure requirements. Districts shall ensure that children served by these contractual arrangements have all the rights and protection of the Wyoming Education Code of 1969 as amended, the Wyoming State Board of Education Rules and Regulations Governing Programs and Services for Handicapped Children in Wyoming School Districts and other applicable state and federal statutes.

b. The provisions of this section shall not be used to delay or avoid establishment within the school district of appropriate educational programs and services needed by handicapped children.

c. All school district contracts shall be signed by the clerk and chairman of the board of trustees. Contracts with agencies shall also be signed by the clerk and chairman of the governing board of the agency.

d. When contracting services with another school district or board of cooperative educational services, the school district may pay a reasonable portion of the services prior to their delivery.

e. Contracts in excess of $400 must receive prior approval from the Office for Handicapped Children. A copy of each proposed contract must accompany the petition for prior approval. (This item is separate and distinct from the reimbursable items contained in Section 7 of this Chapter.) The Office for Handicapped Children may disallow claimed reimbursements for less than $400 under this section where contracts for such services have arbitrarily been divided into multiple contracts to avoid the required prior approval.

f. Whenever possible, and when not in conflict with the best interest of the child, districts should contract services with individuals and organizations within the State of Wyoming.

g. Contracted services reimbursed under this section may be rendered by any accredited or properly licensed public, private or religious institution, provided that the sum set forth in such contracts for in-state services shall not exceed the actual cost per pupil.

h. Contracted services shall be performed only by properly certified and/or licensed persons as verified by the Office for Handicapped Children or by persons working in an educational or educationally related program approved by the Office for Handicapped Children and under the direct supervision of properly certified and/or licensed personnel.

i. Services may be contracted from properly-licensed educational agencies which specialize in the education of handicapped children.

j. Applications for services to be contracted with a board of cooperative educational services shall originate from the district. School Foundation Program reimbursement for such services shall be made directly by the Department of Education to the district which contracts with the board of cooperative educational services.

k. Use of Department of Education contract forms is required for contracting services under this section.

Section 7. Program Evaluation and/or Evaluation Consultation.

Amounts expended during the current year by the district for the evaluation of programs for handicapped children funded under the School Foundation Program will be reimbursed an amount not to exceed the larger of $700 or five percent of the cost of the district's programs conducted under Section 308(h) and Section 309(e) of the Wyoming Education Code as determined by multiplying the number of the district's (308(h) classroom units by the current value of the classroom unit and adding to this product the district's actual expenditures under 309(e).

Section 8. Non-Expendable Instructional Materials and Equipment.

a. The cost of non-expendable instructional materials and equipment that are used in programs for evaluation, diagnosis or instruction, may be reimbursed. Expenditures up to $600 may be reimbursed during the first year of operation for each newly-established position. Positions operated longer than one year may be reimbursed for expenditures up to $150 annually. A district which claims reimbursement for non-expendable materials and equipment for personnel under the provisions of Chapter VI, Section 3, subsection c, of these rules may not also claim reimbursement for non-expendable instructional materials and equipment for personnel under this subsection.

b. When a school district documents that a non-expendable instructional equipment item is necessary to provide a handicapped child appropriate education and this need is written into the child's individualized education program and the item cannot reasonably be purchased under Chapter VI, Section 3, subsections c and f, or under Chapter VI, Section 8, subsection a of these rules, the Office for Handicapped Children may authorize, by prior written approval, reimbursement for purchase of the items. This reimbursement shall be in addition to the district's reimbursement for non-expendable instructional equipment under Chapter VI, Section 3, subsections c and f, or Chapter VI, Section 8, subsection a, of these rules.

c. Non-expendable instructional equipment purchased under subsection b of this section must be available for loan upon request to other school districts when not being used in the district which purchased the equipment. The district which borrows the equipment shall be responsible for delivery costs.

d. A school district may be reimbursed up to $500 annually for contract of maintenance and repair of non-expendable instructional equipment which are authorized and purchased under these rules.

Section 9. Related Educational Services.

a. Necessary costs incurred by the school district for related educational services as defined in Chapter V, Section 4, subsection 1, of these rules may be reimbursed.

b. Related educational services which are obtained from persons who are not staff members of the school district which receives the services must be contracted using forms approved by the Department of Education.

Section 10. Services Authorized During the Summer Months.

a. Reimbursement will be allowed when it is necessary to provide educational diagnostic and evaluation services, during the summer, to handicapped children and to children who are suspected as being handicapped. The intent is to enable school districts to initiate such services for children who require urgent action or who reside in school districts which do not have sufficient diagnostic personnel to serve them during the regular school year. This rule is not designed to provide the entire multidisciplinary diagnostic process during the summer.

Reimbursement shall be subject to the following:

(1) Persons who render such services shall be certified by the Wyoming State Department of Education

as school psychologists, psychological technicians, educational diagnosticians, speech therapists or audiologists, or be properly licensed to render such services.

(2) Screening of preschool children may be reimbursed subject to the following:

(a) Only children eligible to enter kindergarten during the month of September immediately following the screening shall qualify for screening services.

(b) The children must be handicapped or suspected as being handicapped.

(3) All services rendered under this subsection shall require prior approval from the Office for Handicapped Children on contract forms approved by the Department of Education.

b. Reimbursement will be allowed for tuition and room and board of handicapped children placed in out-of-district residential treatment programs when their impairments are so extreme that their return home during the summer would be detrimental to their development. Reimbursement shall be subject to the following:

(1) All services rendered under this subsection require prior approval from the Office for Handicapped Children on contract forms approved by the Department of Education.

(2) The contract must be accompanied by documentation from the district child study committee validating that it would be detrimental to the child to return home during the summer.

CHAPTER VII

APPROVAL

Section 1. Application and Reporting.

a. Each school district which intends to provide educational services for handicapped children that are to be reimbursed according to the provisions of W.S. 21-13-309(e) and these rules shall include the estimated

reimbursable expenditures in the school district's annual general fund budget submitted to the Department of Education.

b. Twenty working days after the end of the fiscal year, each district shall report to the Office for Handicapped Children on forms prescribed by the Department of Education, the district's actual expenditures for programs and related educational services authorized by W.S. 21-13-309(e), and other such information as is needed by the Office for Handicapped Children. Adjustments in the district's 309(e) entitlement shall be based on this report.

c. Pupils enrolled in 309(e) programs and services shall be reported to the Office for Handicapped Children, on forms prescribed by the Department of Education, within two weeks following initiation of the programs or services.

d. All districts which provide services authorized under Section 309(e) are required to submit each of the reports enumerated in the subsections of this section, even if they have no entitlement under the School Foundation Program.

Section 2. Appeal to State Superintendent.

a. Any applying district which is dissatisfied with a decision of the Office for Handicapped Children may appeal in writing to the State Superintendent of Public Instruction. The State Superintendent shall review the appeal and render a written decision within a reasonable period of time.

b. The State Superintendent shall fix the time, manner and place of hearing for addressing any necessary district appeals.

c. The State Superintendent's decision shall constitute the final administrative determination (W.S. 21-2-202(a)(v)).

Section 3. Effective Date. Except as noted these rules and amendments thereto, shall become effective as provided by Section 4, Chapter 108, Session Laws of Wyoming 1965 (W.S. 9-4-204), and will govern entitlements for the 1980-81 school year and each year thereafter. Chapter V, Section 4, subsections e and p shall cease to be effective at the close of the 1980-81 school year. Chapter VI, Section 2, subsection c, shall become effective at the beginning of the 1981-82 school year.

APPENDIX G

RESOURCE MATERIALS

Appendix G-1 Hearing Officer Qualifications

Appendix G-2 Sample Decisions

Appendix G-3 Pre-Hearing Conference

Appendix G-4 Challenges to Impartiality of Hearing Officer

APPENDIX G-1

HEARING OFFICER QUALIFICATIONS

Appendix G-1

HEARING OFFICER QUALIFICATIONS

An effective hearing officer will possess many characteristics that will enable him or her to provide the leadership needed for a successful due process hearing. In addition to personal skills, the hearing officer needs a knowledge base in order to function in the hearing. The following criteria should be considered in selecting hearing officers, and may be used by hearing officers as a checklist for their own preparations.

A. Knowledge Base

A hearing officer should have a reasonable understanding of the following areas:

1. Education

   a) a knowledge of the characteristics and needs of exceptional children;
   b) a knowledge of the programs available to exceptional children;
   c) a knowledge of the definitions utilized for the major handicapping conditions; and
   d) an understanding of assessment tools and procedures.

2. Due Process

   a) an understanding of the history of the development of the right-to-education movement for handicapped children;
   b) an understanding of the basic principles of due process as outlined in the major pieces of litigation, PL 94-142, and state statues; and
   c) an understanding of the judgmental aspects involved in the due process procedure.

A. Knowledge Base (continued)

3. Major Concepts

The hearing officer should have a working knowledge of the following concepts which relate to educational programming:

a) free, appropriate public education;
b) least restrictive environment;
c) continuum of services or cascade model;
d) individualized education program;
e) nondiscriminatory testing;
f) multidisciplinary evaluation; and
g) confidentiality of information.

4. Technical Knowledge

The hearing officer should be familiar with the following technical information:

a) the major due process provisions of the PARC and Mills cases;
b) Public Law 94-142;
c) state statutes relating to due process; and
d) local education agency policies and procedures relating to due process.

B. Personal Qualifications

A hearing officer should possess the following personal qualifications:

1. Objective: able to weigh information and make a decision based on the evidence provided.

2. Unbiased: not prejudiced for or against any party in a hearing.

3. Impartial: not an officer, employee or agent of the local education agency in which a hearing is being held.

4. No previous involvement in the decision.

5. Able to control hearing procedures to complete the hearing process.

Personal Qualifications (continued)

6. Sufficient time available to devote to procedure.

7. Willing to participate in a system to evaluate personal effectiveness.

Sources

Ruhlen, F. Merritt. Federal Administrative Law Judge, Retired, Alexandria, Virginia.

Torres, Scottie. Special Education Administrative Policy (SEAP) Manual. Council for Exceptional Children, 1976.

APPENDIX G-2

SAMPLE DECISIONS

PENNY WILLIAMS, by and through her father, NORMAN B. WILLIAMS,

Petitioner

vs

JORDAN SCHOOL DISTRICT,

Respondent.

HEARING EXAMINER DECISION

Impartial Due Process Hearing Held
March 9-10, 1978

Jordan School District Office
9361 South 400 East
Sandy, Utah

For the Petitioner:

DENNIS V. HASLAM,
Nelson, Hardin, Richards, Leonard and Tate
48 Post Office Place
Salt Lake City, Utah

For the Respondent:

RALPH HAWS
Director of Special Programs
Jordan School District

DAN S. BUSHNELL
LARRY WHITE
Kirton, McConkie, Boyer and Boyle
330 South Third East
Salt Lake City, Utah

Hearing Officer:

DONALD F. KLINE
1579 Ellendale
Logan, Utah

PETITIONER'S Declaration: PENNY WILLIAMS, by and through her father, NORMAN B. WILLIAMS, and Counsel of Record, DENNIS V. HASLAM, request, ". . . that Penny be provided a sign language interpreter in her classes" at the Terra Linda Elementary School in the Jordan School District. (Verbatim Transcript, p. 13)

RESPONDENT'S Declaration: Jordan School District, by and through RALPH HAWS, Director of Special Programs, and Counsel of Record, DAN S. BUSHNELL and LARRY WHITE, maintain, ". . . that it is not in the best interest of Penny or Jordan School District to provide an interpreter, and that it (an interpreter) is not necessary for a free and appropriate public education under the statute." (Verbatim transcript, p. 16.)

FINDINGS OF FACT

General Findings

Prior to the hearing, a determination was made by the Hearing Examiner that the Jordan School District had complied with all aspects of the required procedural safeguards. Full disclosure requirements were met by the exchange of written evidence and lists of witnesses at least five days prior to the conduct of the hearing. Interrogatories directed to the Petitioner (Verbatim Transcript (VT) p. 8 et. seq.) further established that all aspects of the required procedural safeguards had been met.

Counsel for the Respondent has entered for the benefit of the record a Memorandum of Law contending no jurisdiction in this matter under Section 504 of the Rehabilitation Act of 1973 and/or P.L. 94-142, the Education of All Handiapped Children Act of 1975. Counsel for the Petitioner has entered for the benefit of the record a reply to the Memorandum of Law submitted by Respondent under the date of March 3, 1978 at the time of the Hearing. i.e., March 9, 1978.

The Hearing Examiner did not rule upon these issues at this time on the basis that such matters should be left to a court of appropriate jurisdiction rather than become an issue in an Administrative Due Process Hearing.

Findings of Fact from Petitioner's Witnesses and Exhibits

The Examiner finds the following facts based on the testimony and exhibits presented by the Petitioner.

1. Penny Williams, an 11 year old female resides at 8036 South 2280 West in West Jordan, Utah with her parents and attends the Terra Linda Elementary School in the Jordan School District.
2. Petitioner, PENNY WILLIAMS, has a younger female sibling who attends the Murray School for the Deaf.
3. Petitioner's parents, NORMAN B. AND KAREN WILLIAMS, are deaf and/or profoundly hard of hearing.
4. Petitioner, PENNY WILLIAMS, attended the Idaho School for the Deaf for a period of two (2) months.
5. Petitioner, PENNY WILLIAMS, uses sign language as her normal method of communication with her family and learned sign language from other family members.
6. Penny Williams has a typical schedule of classes for an elementary school child except for speech therapy which she receives twice weekly on Monday and Wednesday from Miss Peggy Lee Tanner. Speech therapy is provided for a total of fifty (50) minutes per week.
7. Penny Williams uses the teleprinter machine to communicate with others via phone and is reasonably proficient in the use of the equipment.

8. Penny Williams seems to be a very well adjusted eleven (11) year old girl who responded exceptionally well during direct examination and cross-examination.

9. Penny Williams has been fitted with hearing aids for both ears, complains that wearing both aids causes her to be "nervous" and frequently wears only one of her two aids.

10. Penny Williams is a proficient speech reader. (Confirmation of her lip reading--speach reading--ability is found in testing requested by the Hearing Examiner. Penny was given the Utley Lip Reading test by Patty Gailey and Susan Merril, Jordan School District Audiologist, on March 14, 1978. Results of this examination are entered into the record by the Examiner, March 21, 1978. Prior agreement to further examination for the benefit of the record was secured from Counsel of Record for both the Petitioner and the Respondent on March 10, 1978.)

11. Testing of lip reading ability was conducted on March 14, 1978 using the Utley Lip Reading test. She responded correctly to 28 sentences out of 31 when a voiceless presentation was made and to 29 out of 31 sentences when a voiced presentation was made. Penny demonstrated a 90% score for voiceless

presentation and 94% score under voiced presentation. Lip reading skill for both presentations was excellent.

12. Penny Williams hearing loss, confirmed by tests administered February 28, 1978 and March 14, 1978 indicate a bilateral profound hearing loss through 1000 Hz and no response at equipment limits for 2000 Hz through 8000 Hz. Penny is aware of speech sounds, although not necessarily able to understand spondee words, at 85 decibles unaided and at 35 decibles when wearing a single aid--the left.

13. Social adjustment of the subject is excellent and there was no evidence presented to suggest that the subject had any serious emotional problems beyond the normal frustrations of children of the same age and circumstance.

14. Penny Williams has average to above average intelligence based on standardized tests for the deaf and non-verbal portions of Revised Wechler Scale of Intelligence for Children. Tests administered November 21, 1971 (Leiter International Performance Scale, 1948 Revision) by M. A. Nielson, Ph.D., indicate an I.Q. of 120. Tests administered March 14, 1978 by David G. Weight, Ph.D. (Leiter International Performance Scale and Block Design Subscale of the Revised Weschler Intelligence Scale

for Children) indicate an I.Q. of 87 and 100 respectively. (It should be noted that testing conditions and circumstances frequently cause variation in I.Q. test results. Observation of the subject during the examination and cross-examination strongly suggest that the results of the test administered by M. A. Nielson, Ph.D. in 1971 more nearly reflect Penny's intellectual ability.)

Findings of Fact from Respondent's Witnesses and Exhibits

The Examiner finds the following facts based on the testimony and exhibits presented by the Respondent:

1. That the Jordan School District identified, assessed, and placed Penny Williams in the sixth grade of the Terra Linda Elementary School and developed an Individual Educational Program in accordance with Utah State Board of Education, Rules and Regulations for Programs for the Handicapped, Adopted July 1, 1974, (revised 12-19-75), the Ammended Annual Program Plan for FY 1978 Under P.L. 94-142, Part B Education for All Handicapped Children Act, Submitted July 7, 1977 to the Bureau of Education for the Handicapped, U.S. Office of Education, and specifically under Section 612 (4) and appropriate subsections of P.L. 94-142, an extension and amendment of P.L. 93-380.
2. That in the development of the Individual Educational Plan for Penny Williams, alternative placements were considered.
3. That Penny Williams is currently functioning above the composite average of her grade level and academic placement was based on extensive teacher observations, and standardized test data.
4. That both the strengths and weakness of the subject were taken into consideration in the development of the Individual Educational Program.

5. That the subject, Penny Williams, is functioning very adequately socially, emotionally, and in the areas of adaptive behavior.
6. That the subject, Penny Williams, has many speech problems related to her profound hearing loss.
7. That the speech therapy currently being provided is inadequate in relation to the speech problems evident in the subject's speech.
8. That in the absence of amplification (use of properly fitted hearing aid(s) there is a high probability that the petitioner, Penny Williams, hearing will deteriorate over time.
9. That suitable, proper or "appropriate" placement was determined on the basis of standardized test data, extensive teacher observation, achievement test data, and speech and audiometric test data.
10. That an Individual Educational Program (IEP) was developed and an Individual Implementation Program (IIP) was developed in behalf of Petitioner, Penny Williams.
11. That the Jordan School District placed the Petitioner, Penny Williams, in a regular classroom consistent with the mandate in P.L. 94-142 of "least restrictive environment" consistent with the needs of the individual.
12. That optional placement of the Petitioner, Penny Williams, in a more restrictive environment--the

Murray School for the Deaf--where sign language interpreters and sign language is used as the principal method of communication was left with the parents.

13. That the parents refused this option as suitable or appropriate.

DECISION AND ORDER

The Hearing Examiner has reviewed the reports submitted in evidence and heard the testimony and statements of the witnesses presented by both the Petitioner and Respondent. As a result of this examination he finds no evidence that the Respondent, JORDAN SCHOOL DISTRICT, or the employees thereof have acted in an arbitrary, capricious, or discriminatory manner.

The principal finding of the Hearing Examiner sustains the declaration and plea of the Respondent, JORDAN SCHOOL DISTRICT. Further, it is the Hearing Examiner's finding that a sign language interpreter for the Petitioner, PENNY WILLIAMS, would tend to inhibit rather than enhance her ability to adapt to and function effectively within a society of non-hearing impaired individuals at this time.

Rationale

The rationale for this finding is based upon, but not limited to, the fact that profoundly hard of hearing individuals frequently abandon the use of amplification in the absence of a motivation to continue its use. Providing a sign language interpreter for the Petitioner, PENNY WILLIAMS, at this time would indeed remove the motivation she has for using the amplification made possible through her hearing aid(s). Further, to abandon the consistent use of amplification creates the very high probability (substantiated by the testimony of Mr. Rex Scott, VT, p.102)

that the Petitioner's hearing would in all probability deteriorate over time. Moreover, evidence entered for the benefit of the record at the request of the Hearing Examiner, with the concurrence of Counsel of Record for both parties, shows that the Petitioner's sound awareness level drops from 35 dB (decibles) when aided by amplification to 85 dB or greater in the absence of amplification. Petitioner's potential ability to learn to discriminate between and among sounds, not only for better understanding of speech but essential to improvement of speech, in the absence of consistent use of amplification is seriously impaired.

With the full realization that this is an important period of Petitioner's life in terms of her ability to acquire academic knowledge and skills--an ability that has not been seriously impaired according to the evidence and testimony presented during the hearing--it is also an important period for learning sound discrimination as an integral part of adequate speech and preservation of such residual hearing as may be present.

It is the Hearing Examiner's finding that it is in the Petitioner's best interest to continue to function in the "least restrictive environment" which in this case is a regular classroom of non-hearing impaired peers and without the assistance of a sign language interpreter.

The preponderance of the evidence sustains the conclusion that the Petitioner, PENNY WILLIAMS, is in an appropriate,

suitable, and proper educational placement that is consistent not only with her academic needs but also her need to continue to function effectively in a non-hearing impaired society.

A secondary finding of the Hearing Examiner in this matter is that the Respondent, JORDAN SCHOOL DISTRICT, is in non-compliance with the Rules and Regulations for Programs for the Handicapped (Exhibit 15, Appendix B, p. 9).

The Rules and Regulations for Programs for the Handicapped state:

> C. When handicapped services are provided by itinerant teachers, the minimum time should be 1/2 hour per contact with pupil.

Uncontested testimony (VT, p. 39 and p. 79) indicates that speech therapy is provided by the itinerant speech teacher twice weekly for twenty (20) to twenty-five (25) minutes rather than the prescribed thirty (30) minutes per contact with the pupil. Further, the Hearing Examiner finds that the Respondent, JORDAN SCHOOL DISTRICT, is not, in light of the multiple sound substitutions, omissions, and distortions in Petitioner's speech, providing suitable or appropriate education and training in the area of sound discrimination training and/or speech therapy.

Unfortunately, Petitioner's prayer in this matter did not seek relief from the non-compliance with the State Board of Education Rules and Regulations for Programs for the Handicapped (op.cit.). It is, therefore, not within the purview of the Hearing Examiner to provide such relief.

It is within the purview of the Hearing Examiner, however, to advise the State Superintendent of Public Instruction of this non-compliance on the part of the JORDAN SCHOOL DISTRICT and to strongly recommend that the State Board of Education provide relief through appropriate administrative avenues available to them. Further, the Hearing Examiner will recommend:

(1) That the JORDAN SCHOOL DISTRICT provide compensatory time to the extent feasible;

(2) That the JORDAN SCHOOL DISTRICT increase the frequency of speech therapy to not less than three (3) days per week for a minimum of 1/2 hour per contact with the Petitioner;

(3) That the JORDAN SCHOOL DISTRICT amend the Individual Education Program for Petitioner, PENNY WILLIAMS, stating realistic long term and short term goals as a basis for assessing the effectiveness of the program offered.

By copy of this decision of the Hearing Examiner the State Superintendent of Public Instruction shall be so advised.

This decision and order shall be binding on all parties to this hearing and shall be implemented without delay.

Either party involved in this matter may appeal this decision to the State Board of Education for administrative review. Either party involved in this matter may further appeal this decision to a court of appropriate jurisdiction.

Date: _____

_____
Donald F. Kline, Ph.D.
Hearing Examiner

In re: Case # 079-002) FINDINGS OF FACT, CONCLUSIONS

) AND DECISION

This matter came on for open hearing on October 12, 1979. Petitioner, , was not present, but was represented by his parents who were assisted by David C. Heartman, Director of the Cerebral Palsy Center. Respondent Denver Public Schools was represented by Theodore White, Director of Special Education. Testimony and documentary evidence were received, additional documentary evidence as requested by the Hearing Officer was received on October 17, 1979, and the Hearing Officer pursuant to assent of the parties visited Sabin Elementary School on October 25, 1979. Based upon the testimony and documentary evidence received and considered, and the visitation, the Hearing Officer hereby makes the following findings of facts, conclusions, and decision.

JURISDICTION AND ISSUES

Upon stipulation of the parties, the Hearing Officer finds that he has proper jurisdiction over the subject matter and the parties pursuant to Public Law 93-380 as amended by Public Law 94-142, the Colorado Rules For the Administration of the Handicapped Children's Educational Act, and Section 504 of the Rehabilitation Act of 1973.

It has been stipulated that is a handicapped child under the appropriate definitions in said laws. The issue for determination is the appropriate placement of in a program of special education. Respondent Denver Public Schools asserts that its program for mentally retarded and seriously handicapped at Sabin Elementary School is a free appropriate public education which is provided at public expense under public supervision and direction without charge, meets the standards of the state educational agency and is provided in conformity with an individualized education program which meets the requirements of law under Public Law 94-142. Petitioner asserts that the individual education program is unspecific, that recreation has not been programmed and that the educational program offered is not in the least restrictive environment as required by law. Each of these assertions of the Petitioner shall be discussed by the Hearing Officer.

FACTS

is a six-year-old, severely mentally retarded, hypotonic cerebral palsied hydrocephalic and visually impaired individual. He attended the SEED program at Sewell Rehabilitation Center and enrolled in the United Cerebral Palsy Center in September of 1976. was placed at Sabin Elementary School of the Denver Public Schools in September of 1978 and has continued there to this date.

In January of 1978, the Denver Public Schools passed Resolution 2010 which commenced a process to expand direct services to those handicapped individuals who were not being served by the Denver Public Schools at the time. In February of 1978, the Denver Public Schools by

Resolution 2016 established a panel to advise the School Board concerning school-age children presently in community-centered board programs who may be eligible for direct services within the public school system. Parents with children below the age of five (5) were apparently not included in Resolution 2016's application. In August of 1978, Dr. James O'Hara sent a letter to and erroneously advised them that the process of educational staffings had begun and that was to be included in that process. This letter was retracted by a letter of August 25, 1978, acknowledging the error and advising that was eligible to attend the public school program starting August 30, 1978, and that should he continue to attend the Cerebral Palsy Center School, there would be no financial support given to that center from the Denver Public Schools. On October 17, 1978, wrote to the public schools expressing a desire to appeal the decision concerning placement. Simultaneously, Dr. Mary E. Franza, Instructional Consultant for the Denver Public Schools, wrote to advising them of their right to appeal. Numerous communications occurred thereafter, and several conferences were held culminating in a decision by the Board of Education on April 17, 1979, approving the recommendation of the 2016 committee. Subsequent appeal to the State Department of Education was attempted by , and the matter was finally referred back to an impartial hearing held on October 12, 1979. The Hearing Officer finds that although there existed a one-year delay from the time of initial request by for appeal and the time of impartial hearing, the delay was not a willful or malicious design of the Denver Public Schools. The delay was occasioned by change in policy and procedures attempting to implement

Resolution 2010 of the Denver Board of Education to expand direct services to those handicapped individuals not being served. The Hearing Officer finds that the Denver Public Schools responded in timely fashion to all communications from , and that the frustration of in affecting a timely appeal was considerable, but unpreventable. All procedural defects which may have occurred were waived by at the impartial hearing on October 12, 1979, and a decision on the merits was requested by both parties. The Denver Public Schools is reminded of the timelines required by Public Law 94-142, and such a delay as was occasioned in this case cannot again occur.

DISCUSSION

1. The individualized education program. (Hereafter termed IEP).

The Petitioner asserts that the IEP is incomplete, and by reference refers the Hearing Officer to the Petitioner's Exhibits "3" and "4" for comparison purposes. The Hearing Officer finds that a staffing occurred October 9, 1978, at which , and representatives of the Denver Public Schools and United Cerebral Palsy Center were present. An IEP containing program recommendations, assessment summary, annual goals and short-term objectives was drafted at that time. See Respondent's Exhibits "AA", "BB", and "EE". A review of program occurred December 11, 1978, (Respondent's Exhibit "EE" and "FF") and a review of program occurred March 19, 1979 (Respondent's Exhibit "BB" and "CC"). The Hearing Officer finds that the IEP and subsequent reviews comply with the requirements of Section 121a. 346 of the Rules and Regulations promulgated August 23, 1977, by the Department of Health, Education and Welfare, Office of Education,

concerning Education of Handicapped Children and Implementation of Part B of the Education of the Handicapped Act, hereafter referred to as the Federal Rules and Regulations. Specifically, the IEP includes a statement of the child's present levels of educational performance, annual goals including short-term instructional objectives, specific special education and related services to be provided to the child, the extent to which the child will be able to participate in regular programs, projected times for initiation of services and anticipated duration of the services, and appropriate objective criteria and evaluation procedures and schedules for determining on at least an annual basis whether the short-term instructional objectives are being achieved. As will be noted hereafter, the IEP is deficient in content in regard to the extent of participation in regular education programs (least restrictive environment) and recreation shall be considered later in the decision. The Hearing Officer specifically finds that the burden of proof upon the Denver Public Schools has been met and that with the exception as noted above, the Petitioner's assertion in this regard is without merit.

2. Recreation.

The Hearing Officer finds that free appropriate public education means special education and related services. Related services has been defined in the Federal Rules and Regulations in Section 121a. 13(a) to be supportive services as are required to assist a handicapped child to benefit from special education, and includes recreation. In sub-paragraph (9) of said section, recreation is further defined to include assessment of leisure function, therapeutic recreation services, recreation programs in the schools and community agencies and leisure education. The Hearing Officer has received testimony from Mr. White that although

recreation has not been included in the IEP to date, the Denver Public Schools would consider recreation if appropriate. testified that she considered recreation such as the water activities to be a form of physical therapy. The Hearing Officer finds that the Denver Public Schools have specifically considered the physical therapy needs of and have structured a program to meet those needs adequately. From the evidence before him, the Hearing Officer cannot find that recreation is required to assist to benefit from the special education program, and therefore, cannot find that the related service of recreation need be provided under the concept of "free appropriate public education."

3. Least restrictive environment.

The Denver Public Schools asserts that has been placed in the least restrictive environment by virtue of placement in Sabin Elementary School, a school having classes for both handicapped and nonhandicapped individuals. for the Petitioner asserts that least restrictive environment includes contact with nonhandicapped children, field trips into the public sector, lunch with nonhandicapped children, and in general, a greater opportunity to intermix with the nonhandicapped population. The Federal Rules and Regulations in Section 121a. 550 (b) state in part that each public agency shall insure: (1) That to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped. It is the finding of the Hearing Officer that the legal requirement of least restrictive environment is not satisfied by merely placement of the handicapped child in a school which also educates nonhandicapped children.

The environment referred to in the law necessitates a specific investigation on a case-by-case basis as to whether or not the program being provided establishes the requirement of maximum extent of contact with children who are not handicapped if appropriate. Respondent's Exhibit "BB" which states that least restrictive environment is "to be determined and arranged as appropriate" is not satisfactory in regard to the extent of participation in regular education programs (least restrictive environment) for . Mr. White testified that the Denver Public Schools recognizes its obligation to have children learn with other children of their ages who are nonhandicapped and that in fact, the junior and senior high school handicapped students have been transferred from Sabin Elementary School to accomplish a greater interaction with nonhandicapped children. The classroom teacher, Rosemary Volpe, testified that during the last two (2) months, the only contact her class had with nonhandicapped children occurred approximately once every two (2) weeks during recess. Further, Ms. Volpe testified that the amount of interaction with nonhandicapped children is determined by her and has not been a priority in consideration of other learning activities. The Hearing Officer observed that the physical plant at Sabin Elementary School for the Handicapped is located in one wing of the school, and that the children who are handicapped enter and exit because of the architectural accessibility at the end of that wing away from the classes for nonhandicapped. The Hearing Officer specifically finds that some interaction with nonhandicapped students is appropriate for and that is not being educated in the least restrictive environment by mere placement at Sabin Elementary School.

CONCLUSION AND DECISION

The Hearing Officer specifically determines that the IEP of the Denver Public Schools for is sufficient at law and that the lack of a recreation program is not an unlawful deficiency since it is not required to meet the needs of the Petitioner. The Hearing Officer further concludes that the program of does not meet the requirement at law of least restrictive environment. In view of the fact that is presently placed at Sabin Elementary School, it is the decision of the Hearing Officer that the Denver Public Schools develop a written program at Sabin Elementary School for which would include regular interaction with nonhandicapped children either at the school or in the community. In the event said program is not developed within sixty (60) days of the date of this decision, the Hearing Officer specifically finds that the Denver Public Schools will not have met the requirement of law pertaining to least restrictive environment as contained in the Federal Rules and Regulations. The specific nature of said program shall be left to the discretion of the educators and may include activities such as regular interaction during class time, recess, lunch, school assemblies, or other appropriate places.

DATED this 1st day of November, 1979.

By Steven L. Zimmerman
Steven L. Zimmerman
Hearing Officer

APPENDIX G-3

PRE-HEARING CONFERENCE

Pre-Hearing Conference

The pre-hearing conference provides the hearing officer with important tools for conducting the hearing in a timely manner with a minimum amount of redundent information introduced at the time of the hearing. Chapter XI, §5(h)(9) incorporates Rule 16 of the Wyoming Code of Civil Procedures as a part of the Wyoming Rules by reference. (See Appendix E.)

In conducting the pre-hearing conference it is important that the hearing officer refrain from discussing the merits of the case. The hearing officer should not offer advice to either party. The pre-hearing conference must be held in the presence of the principle parties concerned. Discussion with either party separately could result in an ex parte (on one part; on one side) relationship.

In conducting the pre-hearing conference, the hearing officer may want to have a verbatim recording of the proceedings. In the absence of a verbatim recording, the hearing officer must keep complete and accurate notes in order to provide a record and to avoid any subsequent misunderstanding.

Immediately after the pre-hearing conference, the hearing officer should make the conference a matter of record by writing all parties concerned. In following Rule 16 of the Wyoming Code of Civil Procedures the hearing officer has the obligation to make an order (a written document) reciting the action taken at the conference. The hearing officer's order recites:

1. The amendments allowed to the pleadings;
2. any agreements made by the parties as to the matter considered;
3. the issues to be disposed of at the hearing which were not disposed of by agreements or admissions of the parties involved.

Rule 16 states further:

> . . . and such order when entered (for benefit of the record) controls the subsequent course of the action, unless modified at the trial (hearing) to prevent manifest injustice.

While the time, place, and other physical arrangements for the hearing should have been settled prior to the pre-hearing conference, the hearing officer is well advised to restate these details in the correspondence to all parties concerned.

By the time a disagreement between the school and the parents reaches the stage of a due process hearing the issues to be resolved are usually bitterly contested. While this is not always the case, the pre-hearing conference provides the hearing officer with a much better understanding of the problem(s). Frequently, the pre-hearing conference, even though the merits of the case are <u>not</u> discussed, is the first time issues have been clearly drawn and the "ground rules" set. This delineation of the issue(s) and setting the ground rules may be enough to bring about a settlement between the parties involved.

A sample of a pre-hearing order is found below. It should be noted that this order was taken from another state where the rules of civil procedure had not been incorporated into the state's rules and regulations governing the services to be provided to handicapped children in the schools. It is, therefore, not as complete as one that would be drafted by a hearing officer in Wyoming.

HEARING OFFICER

Logan, Utah 84321

IN THE GRANITE SCHOOL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH

Confidential

, by and through his parents, and Counsel of Record, MR. JOHN E.B. MYERS PETITIONERS -vs- GRANITE SCHOOL DISTRICT, Counsel of Record, MR. BYRON FISHER RESPONDENT	HEARING EXAMINER'S PRE-HEARING ORDER

On Wednesday, 29 April, 1981 Hearing Examiner held a pre-hearing conference with counsel of record for Petitioner and Respondent. The letter from Counsel of Record for Petitioner, MR. JOHN E.B. MYERS, under the date of 24 April, 1981 articulating the issues which he proposed for the forthcoming hearing on 7 May, 1981, served as an agenda for the pre-hearing conference. A copy of the letter containing Hearing Examiner's pencil notation made during the pre-hearing conference will be entered for benefit of the record at the forthcoming hearing.

As a result of the pre-hearing conference, Hearing Examiner ruled that the following issues, and no others, will be heard at the hearing scheduled for 7 May , 1981. The issues to be heard are:

1. Have circumstances surrounding the placement of subject changed sufficiently to justify a modification or change in Hearing Examiner's Decision and Order of 5 January, 1981?

2. Is the appropriate educational placement of subject, , a year round, twenty-four hour residential placement?

3. Would removal of subject, , from his authorized temporary placement at the School be injurious to him?

Hearing Examiner's rationale for dismissal of issues proposed by Petitioner's Counsel of Record under the Date of 24 April, 1981.

Issue identified as 1 in document referenced above:

Respondent's Counsel of Record indicated a willingness to stipulate that subject, , was physically present at the School on 24 March, 1981 when served their 94-142 complaint on the Granite School District.

Issue identified as 2 in document referenced above:

Subject was and is at the School by prior agreement between and the Granite School District. present educational placement was approved by Hearing Examiner as a temporary placement pending the availability of "beds and space" at the Treatment and Education Center . (See correspondence between Joyce C. Barnes, Director of Special Education, and Hearing Examiner under the dates of 28 January, 1981 and 4 February, 1981 respectively. Both documents will be entered as exhibits for benefit of the record by Hearing Examiner at the forthcoming hearing.)

Issue identified as 3 in document referenced above:

Subject's ". . .educational placement within the meaning of the Education for All Handicapped Children Act from and after his first enrollment at School. . . " has a clearly established history and is traceable in the verbatim transcript of the hearing held on 15-16 December, 1980 and subsequent documents, all of which will be entered for benefit of the record at the forthcoming hearing.

Issue identified as 4 in document referenced above:

Hearing Examiner has ruled that this issue shall be heard at the forthcoming hearing.

Issue identified as 5 in document referenced above:

The question of whether or not the Granite School District has a twenty-four hour residential placement that is appropriate to needs is clearly evident in Hearing Examiner's Decision and Order of 5 January, 1981 by ordering placement at or similar residential facility. If the question is intended to establish that a twenty-four hour residential facility is available and operating under the direct aegis of the Granite School District the answer is in the negative. However, the Education for All Handicapped Children Act and the rules and regulations promulgated thereunder clearly establish that if the local education agency does not have appropriate educational programs and/or facilities available it is obligated to contract for appropriate educational programs and related services in the least restrictive environment. Respondent, Granite School

District, has made every effort to carry out this mandate and has established a clear and convincing history of this effort in the case of subject, . (See Hearing Examiner's Decision and Order of 5 January, 1981 and correspondence between Granite School District and Hearing Examiner referenced under Issue identified as 3 above.)

Issue identified as 6 in document referenced above:

See Hearing Examiner's Decision and Order of 5 January, 1981 indicating that should not be placed in a closed institution. Hearing Examiner views the School as more restrictive than or other residential facilities where the public schools are used for educational purposes.

Issue identified as 7 in document referenced above:

Hearing Examiner views this issue as a repetition of issue 4. Hearing Examiner has, therefore, combined issues 4 and 7 and ruled that this issue shall be heard at the forthcoming hearing.

Issue identified as 8 in document referenced above:

Hearing Examiner has instructed Counsel of Record for both Petitioner and Respondent to issue Memoranda of Law regarding this issue. There is no need to put on evidence or hear testimony related to this issue since Hearing Examiner has previously ordered that subject, , shall be placed in a twenty-four hour residential facility at no cost to subject or his parents. Memoranda of Law are now requested in light of case law and rulings that have come down from other Due Process Hearings and Courts throughout the country that should be helpful to Hearing Examiner in arriving

at a decision and order related to this issue set for hearing on 7 May, 1981. Counsel for both Petitioner and Respondent shall submit Memoranda of Law on this issue within ten (10) working days subsequent to the forthcoming hearing.

Issue identified as 9 in document referenced above:

Hearing Examiner is of the opinion that due to the time between subject's current placement at the School and the original Decision and Order of 5 January 1981, the matter is worthy of consideration at the forthcoming hearing.

Hearing Examiner enunciated at the pre-hearing conference that he had no inclination to change or modify his order issued under the date of 5 January, 1981 without ample reason. Further, Hearing Examiner has determined that this is not a new hearing. Rather, it is an extension of the hearing held 15-16 December, 1981. When viewed as an extension, Hearing Examiner is of the opinion that Petitioner has assumed a substantial burden of proof and must put on evidence and testimony to establish the need and justification for Hearing Examiner to amend, or otherwise change, his Decision and Order of 5 Janaury, 1981 which was unanimously upheld by a State level review panel thereby exhausting the administrative remedies available under the Education for All Handicapped Children Act making it possible for Petitioner to carry the matter directly to a court of appropriate jurisdiction. As noted in Hearing Examiner's response to Petitioner's Motion for Disqualification on 23 April, 1981, "Hearing Examiner's agreement to hear the matter now pending comes solely as a result of Respondent's request that a hearing be held thereby suggesting justification that new evidence and new testimony are (now) appropriate."

It should be noted that Hearing Examiner will ensure entry for benefit of the Record Petitioner's Motion for Disqualification as well as Hearing Examiner's Response.

Hearing Examiner will also enter for benefit of the Record the verbatim transcript of the hearing held 15-16 December, 1980 together with all evidentiary materials contained therein.

ORDERED this 30th Day of April, 1981

HEARING EXAMINER

APPENDIX G-4

CHALLENGES TO IMPARTIALITY OF HEARING OFFICER

Challenges to Impartiality of Hearing Officer

It is unlikely that a challenge of the hearing officer will be made on the basis of his/her qualifications. Given the safeguards in Wyoming's Administrative Procedures Act, which is incorporated in the Wyoming State Board of Education Rules and Regulations Governing Programs and Services for Handicapped Children in Wyoming's School Districts (Wyoming Rules) and the methods used in the selection of Hearing Officers.

The problem of impartiality may be another matter. Hearing officers have disqualified themselves on the basis of a personal friendship with the district's special education director during college years. Others have disqualified themselves because of their close working relationships with another district in the same area of the state. Some have disqualified themselves on the basis of their bias toward a school's program. There are any number of reasons why a hearing officer might elect to disqualify him/herself.

The Education for All Handicapped Children Act requires that due process hearing officers must be impartial (20 U.S.C. & 1415; 34 CFR, part 300). If the due process hearing were a "court" procedure rather than an "quasi-legal" process designed to insure full participatory decision making of the parent(s) of a handicapped child, the Rules of Civil Procedure, State Supreme Court cases, or the Code of Judicial Conduct might apply. However, there are no rules concerning disqualification which pertain where the impartiality of a hearing officer has been questioned.

While the Rules of Civil Procedure, State Supreme Court cases or the Code of Judicial Conduct might provide some guidance to a hearing officer called upon to make a decision regarding his/her impartiality, honesty and good judgment are the only guidelines that can be offered at the present time.

When a formal motion has been filed with a hearing officer seeking his/her disqualification, it is important to remember that a response is required and both the motion for disqualification and the hearing officer's response must be made a matter of record. If a proposed hearing officer elects not to hear the case at the outset and prior to the hearing itself, there is no issue. If a proposed hearing officer accepts the case and a motion for disqualification is filed after that time, the hearing officer must insure a complete and accurate record of both the motion and his/her response to it.

A formal motion for disqualification of a hearing officer and the hearing officer's response is found on the following pages.

Ex A1

Confidential

John E.B. Myers
LEGAL CENTER FOR THE HANDICAPPED
Attorneys for Petitioners
455 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-1347

IN THE GRANITE SCHOOL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH

, and
on behalf of
their son, :

Petitioners,

vs :

GRANITE SCHOOL DISTRICT,

Respondent. :

MOTION FOR DISQUALIFICATION OF HEARING OFFICER

COME NOW the Petitioners, by and through their attorney undersigned, and move the Hearing Officer to disqualify himself from sitting as Hearing Officer in the forthcoming due process hearing to be held on behalf of the minor child, . This motion is supported by a Memorandum of Points and Authorities and by the affidavits of Dr. and Mrs. .

DATED this 16 day of April, 1981.

Respectfully submitted,

LEGAL CENTER FOR THE HANDICAPPED

John E.B. Myers
Attorney for Petitioners

John E.B. Myers
LEGAL CENTER FOR THE HANDICAPPED
Attorneys for Petitioners
455 East 400 South, Suite 300
Salt Lake City, Utah 84111
Telephone: (801) 363-1347

IN THE SCHOOL DISTRICT

SALT LAKE COUNTY, STATE OF UTAH

, and
, on behalf of
their son, , :

Petitioners, MEMORANDUM OF POINTS AND AUTHORITIES

vs :

SCHOOL DISTRICT,

Respondent. :

During the month of December, 1980, a due process hearing on behalf of the minor child, , was held in the Granite School District. The Hearing officer was . The hearing was held on December , 1980, and the Hearing Officer's decision was dated January , 1981.

In the four months which have elapsed since the December, 1980 hearing, a great deal has occurred. In particular, the parties have reached an impass concerning the educational placement of . Because that impass could not be resolved informally, a due process hearing has been requested by Dr. and Mrs. . By letter dated April 3, 1981, District requested that serve as Hearing Officer for the forthcoming hearing.

The United States has adopted Canon 3 as the standard by which to determing whether a federal judge should disqualify himself. (28 U.S.C. §455.) In interpreting the federal rule the Tenth Circuit Court of Appeals, the federal appeals court with jurisdiction over Utah, stated that

> 28 U.S.C. §455 provides that a judge should disqualify himself in any proceeding in which his impartiality "might reasonably be questioned." Hence, appearance of impartiality is virtually as important as the fact of impartiality. (Webbe v. McGhie Land Title Co., 549 F.2d 1358, 1361 (10th Cir. 1977).

In Rice v. McKenzie, 581 F.2d1114, 1116 (4th Cir. 1978), the Court stated that

> The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis of all the circumstances . . . . [I]f there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case. (emphasis is original.)

The foregoing authorities provide ample support for Petitioners Motion to Disqualify. While it may well be the case that is in fact impartial and unbiased, his deep involvement in the former due process hearing and the content of his Decision and Order raise at least "a reasonable factual basis for doubting the [Hearing Officer's] impartiality." That being the case, he should disqualify himself.

While the rule may not be applicable in the strict sense of the word to present proceeding, it clearly illustrates the policy of the law in Utah. The affidavits filed with the Motion For Disqualification expressly state the belief that has a bias against the personally and about the appropriate outcome of the proceeding. That being so, it is appropriate for him to disqualify himself as the Hearing Officer.

Further support for this argument may be found in a Utah Supreme Court case interpreting Rule 63. In Anderson v. Anderson, 368 P.2d 264, 265 (Utah 1962), the Court stated

> If the rule means anything at all, it means what is plainly stated to the effect that the judge against whom the affidavit of bias and prejudice [is filed] thereafter cannot proceed to hear the issue himself. Our only conclusion is that any order of judgment based on evidence thereafter taken by him would be ineffective against the affiant.

In sum, the policy of Utah law militates in favor of the determination that should disqualify himself.

The American Bar Association Code of Judicial Conduct governs the conduct of judges throughout the United States. Canon 3,C. states:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. (emphasis added)

At page 10 it is stated:

> Continued residence in the home of his parents, Dr. and Mrs. , would be detrimental to providing a free appropriate education in the least restrictive environment consistent with Subject's educational needs.

Based upon written Decision, Petitioners argue that it would be impossible for him to be impartial when listening to and evaluating their testimony. His express opinion that they have "contributed significantly" to their son's handicap speaks plainly of his opinions of Dr. and Mrs. . Whether his opinion be correct or not is not the issue. The important consideration is that he has come to certain conclusions which would as a matter of course color his decision-making if he were to sit as Hearing Officer at the forthcoming hearing.

The Education for All Handicapped Children Act required that due process hearing officers must be impartial. (20 U.S.C. §1415; 45 C.F.R. §§121a.506, 121a.507.) In the event a proposed hearing officer is not impartial, voluntary disqualification is in order. While there are no rules concerning disqualification which pertain specifically to the instant case, principles evolved in the courts are instructive.

Rule 63(b) of the Utah Rules of Civil Procedure states:

> Whenever a party to any action or proceeding, civil or criminal, or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call in another judge to hear and determine the matter.

or a similar setting is. Since the issue of placement will lie at the very heart of the hearing and since decided that issue at the prior hearing, it will not be possible for him to approach the upcoming hearing with the neutrality required of an impartial Hearing Officer. Even if he were able to overcome his prior opinions and determinations to his personal satisfaction, his acting as Hearing Officer would carry with it at least the appearance of partiality. At the very least, his impartiality might reasonably be questioned.

B. The Parties.

Without intending the least disrespect for , Petitioners suggest that he has formed certain opinions regarding their parenting abilities and the home environment which they provide for . These opinions are reflect in his Decision. At page 4 it is stated:

> Hearing Examiner finds that the stressful relationship that exists between parents and child has contributed significantly to subject's handicapping conditions. Hearing Examiner also finds that the lack of consistency in discipline imposed, family "rules", and rigid standards and expectations on the part of the parents all contribute to his present problems.

At page 5 it is stated:

> Hearing Examiner finds that continued confrontations in the home environment will mitigate against his becoming an independent self-sustaining adult capable of making socially acceptable decisions. Further, Hearing Examiner finds that a continuation in his present home environment will contribute to deterioration of his academic progress.

The issues for decision at the upcoming hearing have not yet been clarified with finality. Suffice it to say, for purposes of this argument, that the hearing will not be a continuation or extension of the prior hearing. While much of the same ground will of necessity be covered, many of the issues will be different. For example, new evidence will be adduced concerning 's clinical and academic progress since the prior hearing. Further evidence will be presented regarding the differences between School and other potential educational placements. Importantly, Petitioners intend to put on efidence which will explore some of the ground covered during the prior hearing. This must be done in order to reach a proper decision concerning 's placement.

In order for the Hearing Officer at the forthcoming hearing to render a fair and impartial decision, it is absolutely necessary that he or she approach the case without the burden of preconceived opinions about the issues or the parties. Petitioners respectfully submit that (proposed hearing officer) has such opinions regarding both the issues and the parties. (See attached affidavits.)

A. The Issues.

Having listened to a great deal of evidence relating to issues which will be in some instances very similar or identical to those discussed at the upcoming hearing, it will not be possible for to approach the evidence with an open and neutral mind. This is no disparagement of his integrity, but rather an observation of human nature. Having heard the evidence before him, he reached a decision which he reduced to a written Decision and Order. He has decided that is not an appropriate placement, and that

ARTEC or a similar setting is. Since the issue of placement will lie at the very heart of the hearing and since decided that issue at the prior hearing, it will not be possible for him to approach the upcoming hearing with the neutrality required of an impartial Hearing Officer. Even if he were able to overcome his prior opinions and determinations to his personal satisfaction, his acting as Hearing Officer would carry with it the appearance of partiality. At the very least, his impartiality might reasonably be questioned.

B. The Parties

Without intending the least disrespect for , Petitioners suggest that he has formed certain opinions regarding their parenting abilities and the home enviornment which they provide for . These opinions are reflected in his Decision. At page 4 it is stated:

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> Continued residence in the home of his parents, would be detrimental to providing a free appropriate education in the least restrictive environment consistent with Subject's needs.

Based on written Decision, Petitioners argue that it would be impossible for him to be impartial when listening to and evaluating their testimony. His express opinion that they have "contributed significantly" to their son's handicap speaks plainly of his opinions of . Whether his opinion be correct or not is not the issue. The important consideration is that he has come to certain conclusions which would as a matter of course color his decision-making if he were to sit as Hearing Officer at the forthcoming hearing.

The Education For All Handicapped Children Act requires that due process hearing officers must be impartial. (20 U.S.C. § 1415; 45 C.F. R. §§ 121a.506, 121a.507.) In the event a proposed hearing officer is not impartial, voluntary disqualification is in order. While there are no rules concerning disqualification which pertain specifically to the instant case, principles evolved in the courts are instructive.

Rule 63(b) of the Utah Rules of Civil Procedure state:

> Whenever a party to any action or proceeding, civil or criminal, or his attorney shall make and file an affidavit that the judge before whom such action or proceeding is to be tried or heard has a bias or prejudice, either against such party or his attorney or in favor of any opposite party to the suit, such judge shall proceed no further therein, except to call in another judge to hear and determine the matter.

While the rule may not be applicable in the strict sense of the word to the present proceeding, it clearly illustrates the policy of the law in Utah. The affidavits filed along with the Motion For Disqualification expressly state the belief that has a bias against the personally and about the appropriate outcome of the proceeding. That being so, it is appropriate for him to disqualify himself as the Hearing Officer.

Further support for this argument may be found in a Utah Supreme Court

case interpreting Rule 63. In Anderson v. Anderson, 368 P.2d 264, 265 (Utah 1962), the Court stated

> If the rule means anything at all, it means what is plainly stated to the effect that the judge against whom the affidavit of bias and prejudice (is filed) thereafter cannot proceed to hear the issue himself. Our only conclusion is that any order of judgment based on evidence thereafter taken by him would be ineffective against the affiant.

In sum, the policy of Utah law militates in favor of the determination that should disqualify himself.

The American Bar Association Code of Judicial Conduct governs the conduct of judges throughout the United States. Canon 3,C. states:

> (1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. (emphasis added)

The United States has adopted Canon 3 as the standard by which to determine whether a federal judge should disqualify himself. (28 U.S.C. §455). In interpreting the federal rule, the Tenth Circuit Court of Appeals, the federal appeals court with jurisdiction over Utah, stated that

> 28 U.S.C. §455 provides that a judge should disqualify himself in any proceeding in which his impartiality "might reasonably be questioned." Hence, appearance of impartiality is virtually as important as the fact of impartiality. (Webbe v. McGhie Land Title Co., 549 F.2d 1358, 1381 (10th Cir 1977).

In Rice v. McKenzie, 581 F.2d1114,1116 (4th Cir. 1978), the Court stated that

> The question is not whether the judge is impartial in fact. It is simply whether another, not knowing whether or not the judge is actually impartial, might reasonably question his impartiality on the basis

> of all the circumstances. . . .(I)f there is a reasonable factual basis for doubting the judge's impartiality, he should disqualify himself and let another judge preside over the case. (emphasis in original.)

The foregoing authorities provide ample support for Petitioners Motion to Disqualify. While it may well be the case that is in fact impartial and unbiased, his deep involvement in the former due process hearing and the content of his Decision and Order raise at least "a reasonable factual basis for doubting the (Hearing Officer's) impartiality." That being the case he should disqualify himself.

DATED this _____ day of _____, 1981.

Respectfully submitted,

LEGAL CENTER FOR THE HANDICAPPED

_____

John E. B. Myers
Attorney for Petitioners

this opinion upon 's remarks at the December, 1980 hearing. It is my opinion that is biased against the School and would not be able to render an impartial decision as to whether or not my son should be placed at that school.

5. It is my opinion that has formed certain conclusions about my parenting abilities and about my involvement, if any, in the etiology of my son's handicap. I base this opinion upon the written statements of in his Decision and Order dated January , 1981. It is my opinion that is biased against me and that that bias would render it impossible for him to evaluate my testimony with impartiality.

Dated this ____ day of April, 1981.

_____

Subscribed and sworn to before me this ____ day of April, 1981.

_____
NOTARY
Residing _____ County

My commission expires:
2/18/84

MOTION FOR DISQUALIFICATION

ANDREW FRANCE, by and through his parents Dr. and Mrs. and Counsel of Record, Mr. John E.B. Myers

PETITIONERS

-vs-

SCHOOL DISTRICT, Mr. Byron Fisher, Counsel of Record

RESPONDENT

Confidential

HEARING EXAMINER'S RESPONSE

Hearing Examiner in the above referenced matter has examined the motion by Counsel for Petitioner to disqualify himself in the forthcoming hearing to be held on behalf of the minor child .

Having again reviewed the verbatim transcript of the hearing on behalf of held December , 1980, Hearing Examiner finds ample evidence in the testimony presented at hearing to justify the conclusions of facts, decision and order rendered under the date of January 5, 1981.

Hearing Examiner also notes that not infrequently do parties aggrieved as a result of such hearing attribute the result to the bias or prejudice of the Hearing Examiner. Further, Hearing Examiner finds ample evidence and testimony to establish that Dr. and Mrs. placed subject, , first in a foster home and subsequently in the School of their own free will and volition, recognizing a ". . .stressful relationship (did) exist between the parent and child..." The affidavits appended to Counsel's motion for disqualification of Hearing Examiner are, therefore, totally unconvincing.

Further, the motion for disqualification argues; that, ". . . the hearing will not be a continuation or extension of the prior hearing." At the same time, it is clear that the central issue is one of placement of subject, .

Hearing Examiner finds, therefore, no justification to put on evidence or the taking of additional testimony in order to reach a proper decision concerning placement. Hearing Examiner finds, however, that new evidence and new testimony may be appropriately received at the forthcoming hearing because of the time between the original decision and order and the date established for the forthcoming hearing. To try again the same issues would violate the legal principle of res judicata. The decision and order of January , 1981 is binding on all parties concerned. Additionally, the decision and order of January , 1981 was unanimously upheld by a State level review panel. Relief from the decision of January , 1981 may be found in a court of appropriate jurisdiction as provided by P.L. 94-142.

Any hearing regarding the placement of must be based on new evidence and testimony and therefore can only be construed as an extension or continuation. Hearing Examiner's agreement to hear the matter now pending comes solely as a result of RESPONDENT'S request that a hearing be held thereby suggesting justification that new evidence and new testimony are appropriate.

Hearing examiner will call for a pre-hearing conference with Counsel for both Petitioner and Respondent prior to the forthcoming hearing in order to clarify all issues to be heard.

Motion for disqualification of hearing officer is hereby denied.

Dated this 23rd day of April, 1981

_____

Hearing Officer

CC:

APPENDIX H
WYOMING RULES OF CIVIL PROCEDURE

WYOMING RULES OF CIVIL PROCEDURE

Chapter XI, Section 5(h)(9) reads as follows:

> (9) in the discretion of the State Board of Education or its designee, and upon request of either parent or guardian or local school district officials, a prehearing conference shall be held pursuant to scope and procedure outlined in Rule 16 of the Wyoming Rules of Civil Procedure. However, in no event will such prehearing conference be held later than five (5) days prior to the hearing. All references in Rule 16 to the "Court" shall be deemed to refer to the "State Board of Education or its designee." Further, all reference to the "Trial" in Rule 16 shall be deemed to refer to "hearing."

Experienced due process hearing officers strongly recommend that a pre-conference hearing be held. All parties (petitioner and/or petitioner's consel and respondent and/or respondent's counsel) should be present. The purposes of the pre-hearing conference are detailed in Rule 16 of the Wyoming Code of Civil Procedures.

Rule 16. Pretrial Procedure; Formulating Issues. (Note: Chapter XI, § 5(h)(9) of the Wyoming Rules referenced above state that "Trial" in Rule 16 shall be deemed to refer to "hearing" and "Court" shall be deemed to refer to the "State Board of Education or its designee". The words to be substituted in Rule 16 are included in the quoted material below and set out in parentheses ( ).

Rule 16 would read as follows:

Rule 16. Pretrial(prehearing) Procedures; Formulaing Issues.

> In any action, the court (State Board of Education or its designee) may in its discretion, and upon request of any party shall, direct the attorneys for the parties to appear before it for a conference to consider
>
> (1) The simplification of the issues;
> (2) The necessity or desirability of amendments to the pleadings;
> (3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;
> (4) The limitation of the number of expert witnesses;
> (5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;
> (6) Such other matters as may aid in the disposition of the action.

> The court (State Board of Education or its designee) shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admission or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial (hearing) to prevent manifest injustice. The court (State Board of Education or its designee) in its discretion may establish by rule a pre-trial (pre-hearing) calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

It should be noted here that references to jury actions appear to apply to civil court procedures only. The State Board or its designee (a qualified due process hearing officer selected from a Roster of qualified hearing officers maintained in the Office of the State Board of Education) will hear all of the matters to be considered at the due process hearing.

It is also important to note that all attempts to resolve the problem must first be made through mediation. Mediation of issues by the parties most directly involved in the conflict, that is, parents, teachers, child study team, is the most acceptable solution for all concerned. Only after resolution of the problems at this level becomes impossible should the issue(s) be referred to third party mediation or to a due process hearing.

APPENDIX I

JURISDICTION OF DUE PROCESS HEARING OFFICERS

JURISDICTION OF DUE PROCESS HEARING OFFICERS

Hearing officers always face the problems of knowing those issues over which they have jurisdiction. Is it within the jurisdiction of a due process hearing officer to award damages? If in the course of conducting a due process hearing he/she comes upon issues that have not been specified in a petitioner's prayer, can he rule on these issues? Can a due process hearing officer use the hearing as a platform to enable a school district to accomplish some needed reform to benefit handicapped children? Remembering that P.L. 94-142 is designed not only to guarantee a free appropriate public education, nondiscriminatory evaluation, procedural due process, and parental participatory decision making but also as a vehicle for the schools to ensure that handicapped students receive individualized educational programs and related services, what are the limits of the hearing officer?

Current law on the subject is found in the landmark precedent setting cases such as PARC,[1] Mills,[2] and LeBanks v. Spears.[3] Other litigation, while limited by the facts involved in a particular case, also shed some light on the question of jurisdiction. Loughran v. Flanders (See at 3 EHLR 551:161 et seq.) held that alleged cause for monetary damages would be contrary to both the history and the purpose of the Education for All Handicapped Children Act of 1975 and its statutory predecessors.

One of the functions of the Act inter alia is to provide parents/guardians of a handicapped child the opportunity to participate in the educational decision making process. A guarantee of this right of participatory decision making regarding a handicapped child is the impartial due process hearing whereby a parent/guardian may challenge: (1) the identification, (2) the evaluation, and/or (3) the placement of a

handicapped child (20 U.S.C.§1415). Specifically, after a complaint regarding a child's identification, evaluation or placement is made, the state must provide the parent/guardian with an impartial due process hearing on these issues (20 U.S.C.§1415(e)(2). This is a limited grant of jurisdiction, however, since it authorizes review only of claims alleging (1) errors in the identification, (2) errors in the evaluation, (3) errors in the placement, (4) denial of the Act's numerous procedural safeguards (20 U.S.C.§1415(e)(2); see also Stuart v. Nappi, F. Supp. 1235 D. Conn. 1978).

The legislative history of P.L. 94-142 and its statutory predecessors share a common trait; namely, ". . . each is devoid of even the slightest suggestion that Congress intended for it to serve as a vehicle through which to initiate a private cause of action for damages" (Loughran v. Flanders, see at EHLR 551:163).

Absent specific authority in a State's Annual Program Plan for implementation of Part B of the Act or rules and regulations promolgated under state statutes that grants a hearing officer jurisdiction beyond that conveyed in 20 U.S.C.§1415 to rule on issues other than those noted above would clearly breach the jurisdiction granted a due process hearing officer.

If a hearing officer comes upon issues that have not been specified in petitioner's prayer, to rule on such issues is clearly beyond the scope of the hearing and should be avoided. Even though the school administrator may privately desire assistance in solving a specific problem, enabling him/her to better provide for the handicapped, a <u>decision on issues not specified</u> in petitioner's prayer not only violates his/her authority but in all probability will infringe upon the prerogatives of the school board.

One method of resolving the use of the due process hearing as an enabling procedure while at the same time protecting the integrity of the hearing officer may be found in one of the sample decisions in Appendix F. Reference is made to a case involving a deaf-blind child who sought weekly transportation from his home to a state operated residential school. While petitioner was concerned about transportation without cost to parents, the school's administrator was privately concerned about the safety of the transportation being provided on a contract basis with a private operator. In this case petitioner's prayer was granted based on the evidence and testimony presented. The child's IEP called for weekly visits to his home. The matter of safety of the services provided on a contract basis was clearly brought out during the course of the hearing. The hearing officer discussed this issue in his findings but did not make a decision or issue an order on this issue. Rather, he called it to the attention of the State Board of Education, under whose aegis the school operated, and strongly suggested that the State Board of Education provide a remedy.

Hearing officers are admonished, however, to use this technique with caution. It is a two-edged sword that should not be unsheathed by the inexperienced.

While answers to the questions proposed at the beginning of this discussion are provided above, the reader is reminded that these questions are only illustrative. There is no substitute for good judgment, experience, and an abundant exercise of caution.

References

1. PARC v. Commonwealth, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279,282 (E.D. Pa. 1972).

2. Mills v. Board of Educ. of Dist. of Columbia, 348 F. Supp. 866, 871, 875, (D.D.C. 1972).

3. LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973).

4. Education of the Handicapped Law Report.

APPENDIX J

WYOMING EDUCATION CODE, 1969 AS AMENDED

Duties of the Board of Trustees

Wyoming Education Code, 1969 As Amended
Duties of the Board of Trustees

(xiii) Consider every petition presented to the board and subscribed by at least five (5) citizens of the school district and take some action on such petition within thirty (30) days after it is received; provided, that no action shall be required if the precise question presented by the petition has been considered and acted upon by the board of trustees at any meeting held within the current fiscal year; (W.C. 21-3-110 § xiii)

Note: This section of the Wyoming Education Code has sometimes been used by parents who feel that school personnel have not given their point(s) of view due consideration in the identification, evaluation, and placement of handicapped children in programs that are suited to the needs of the child(ren) and/or in the least restrictive environment. Intervention by the Board of Trustees has sometimes brought about a solution to the disputed issue(s) without the need for due process hearings.